TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO, APPELLANT,

vs.

B. A. WORTHINGTON, RECEIVER OF THE WHEELING & LAKE ERIE RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED SEPTEMBER 7, 1911.

(22,852.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1911.

a

No. 2090.

United States Circuit Court of Appeals, Sixth Circuit.

RAILROAD COMMISSION OF OHIO, Appellant,

vs.

B. A. WORTHINGTON, Receiver of the Wheeling & Lake Erie Railroad Company, Appellee,

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Record.

Original Transcript Filed July 25, 1910.

1

Transcript of Record.

UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss:

Record of the proceedings of the Circuit Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said Court begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the fifth day of said month in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and thirty-fourth, to-wit: on the 25th day of June, A. D., 1910.

Present: The Honorable Robert W. Tayler, United States District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of the Wheeling & Lake Erie Railroad Company,

vs.

RAILROAD COMMISSION OF OHIO et al.

Said action was commenced on the 28th day of March, A. D. 1910, and proceeding to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the Court were made and entered in the order and on the dates hereinafter stated, to-wit:

(*Bill of Complaint.*)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of the Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS Association of Ohio, Frank M. Osborne, its President, and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

2 *Bill of Complaint.*

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division:

The above named complainant, B. A. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company brings this, his bill of complaint, against the above named defendants, Railroad Commission of Ohio, a quasi body-corporate of the State of Ohio, Pittsburg Vein Operators' Association of Ohio, a voluntary association, having its principal office at Massillon, in said District, Frank M. Osborne its President residing in Cleveland, Ohio, Howard M. Mannington its Secretary, residing at Columbus, Ohio, C. E. Maurer, residing at Ravenna, Ohio, J. J. Roby and W. P. Murray, residing at Cleveland, Ohio, Edward Johnson, residing at Columbus, Ohio, John Doe and others members of said Association, and says:

I.

The Railroad Commission of Ohio is a quasi body-corporate created and organized under and pursuant to the laws of the State of Ohio with capacity to be sued in its corporate name and, as respects the matters and things hereinafter set forth, and as to the orders and rulings of said Railroad Commission, has assumed and pretended to act under delegated power from the legislature of the State of Ohio. The Commission is authorized to keep its office in the capital of the State of Ohio, to-wit: Columbus, and is authorized to hold sessions at any place other than the capital, as the convenience of the parties so requires.

The Pittsburg Vein Operators' Association of Ohio is a voluntary association of persons or corporations owning, controlling or operating coal mines in what is known as the No. 8 Ohio Coal District, situated in Jefferson, Harrison and Belmont Counties, Ohio; and the place of business of said association is in the city of Massillon, Ohio, within the Northern District of Ohio, Eastern Division thereof.

Frank M. Osborne is the President of said Pittsburg Vein Operators Association of Ohio, and is a citizen and resident of the State of Ohio and of the Northern District, Eastern Division thereof. Howard M. Mannington is the Secretary of said Association and is a citizen and resident of the State of Ohio residing at Columbus, Ohio, C. E. Maurer, residing at Ravenna, Ohio, and J. J. Roby and W. P. Murray residing at Cleveland, Ohio, are citizens and residents of the State of Ohio and of the Northern District, Eastern Division thereof, and are members of said association. Ed-
3 ward Johnson residing at Columbus, Ohio, is a citizen and resident of the State of Ohio, and is also a member of said Association, John Doe and others, whose names and residences are unknown to this complainant, are likewise members of said Association.

The Complainant, B. A. Worthington, is the duly appointed, qualified and acting Receiver of all the property rights and franchises of The Wheeling & Lake Erie Railroad Company, having been appointed as such on the 8th day of June, 1908, by the United States Circuit Court for the Northern District of Ohio, Eastern Division, in cause therein pending entitled "National Car Wheel Company, complainant, vs. The Wheeling & Lake Erie Railroad Company, defendant, in Equity," and, by order of said court made and entered in said receivership suit on the 28th day of March 1910, is authorized to file this bill of complaint against above named defendants.

II.

The amount in controversy in this action, which is a civil action, exceeds, exclusive of interest and costs, the sum of five thousand dollars, and is a controversy arising under the Constitution of the United States, *to* this, to-wit:

Your orator in all matters hereinafter referred to, and particularly in charging and enforcing the "lake-cargo coal" rate hereinafter mentioned, has acted and is acting under and pursuant to the order of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division thereof, in cause therein pending wherein the court took possession of the railroad, property, rights and franchises of The Wheeling & Lake Erie Railroad Company and appointed your orator Receiver thereof, and authorized and directed him to continue the operation of said railroad.

Your orator seeks relief against the defendants in this bill by reason of an attempt on the part of the said Railroad Commission of Ohio and the Pittsburg Vein Operators Association of Ohio and its officers and members to enforce against your orator a certain order of The Railroad Commission of Ohio prescribing a rate on lake-cargo coal, hereinafter mentioned, which constitutes an unlawful interference with the property constituting the receivership estate administered as aforesaid; and also to enforce against your orator a law of the State of Ohio depriving the owners of and persons interested in the property constituting the receivership estate of their property without due process of law and denying to them the equal protection

of the law, and obstructing the interstate commerce engaged in by your orator, in contravention and violation of the Constitution of the United States and especially contrary to Section 8, Article
4 1, and the 14th Amendment of said Constitution.

III.

Your orator shows that the property constituting the receivership estate consists of a single track railroad extending from Toledo, Ohio, to Steubenville and Martins Ferry on the Ohio River, and from Adena to St. Clairsville, and from Huron on Lake Erie to Norwalk Junction, aggregating approximately 272.83 miles in length, known as the Toledo Division of said railroad; from Cleveland to Zanesville, from Canton to Sharrodsville, and various small branches extending therefrom, aggregating approximately 235.03 miles in length, and known as the Cleveland Division of said railroad.

IV.

Your orator further shows that the issued and outstanding capital stock of said The Wheeling & Lake Erie Railroad Company is as follows:

Common Stock	$20,000,000.00
First Preferred	4,986,900.00
Second Preferred	11,993,500.06
Total Stock Capital	$36,980,400.00

The funded debt and equipment obligations of said railroad company are as follows:

Funded Debt.	Date of Issue.	When Due.	
1. Lake Erie Division First Mortgage	July 1, 1886.	Oct. 1, 1926.	$2,000,000.00
2. Wheeling Division First Mortgage	Apr. 21, 1888.	July 1, 1928.	894,000.00
3. Extension and Improvement. First Mortgage	Dec. 20, 1889.	Feb. 1, 1930.	409,000.00
4. First Consolidated Mortgage	Sept. 1, 1899.	Sept. 1, 1949.	11,697,000.00
5. Three Year Gold Notes	Aug. 1, 1905.	Aug. 1, 1908.	8,000,000.00
Total funded indebtedness			$23,000,000.00

Equipment Obligations.

6. Fidelity & Deposit Co. of Maryland	Apr. 1, 1901.	Apr. 1, 1911.	73,000.00
7. Fidelity & Deposit Co. of Maryland	May 1, 1901.	May 1, 1911.	24,000.00
8. Equipment Sinking Fund 5 per cent bonds	Jan. 1, 1902.	Jan. 1, 1922.	1,798,000.00
5			
9. The Guardian Savings & Trust Company, Series A.	Nov. 1, 1904.	Nov. 1, 1914.	165,000.00
10. The Guardian Savings & Trust Company, Series B.	Nov. 1, 1904.	Nov. 1, 1914.	29,000.00
11. Commonwealth Trust Co., Series A.	Dec. 1, 1904.	Dec. 1, 1914.	255,000.00
12. Commonwealth Trust Co., Series B.	Dec. 1, 1904.	Dec. 1, 1914.	44,000.00
Total equipment obligations.....			$2,388,000.00
Total bonds and obligations.....			$25,388,000.00

Your orator further shows that, as Receiver of The Wheeling & Lake Erie Railroad Company, under and pursuant to orders made and entered from time to time in said receivership cause, he has borrowed money for the purpose of rehabilitating the property, the making of additions and betterments, paying the interest on underlying bonds for the purpose of preserving the integrity of the property and taxes amounting in the aggregate to $4,002,350.00, itemized as follows:

July 1, 1908, for interest on Wheeling Division bonds	$22,350.00
July 1, 1908, for property taxes.....	85,000.00
Sept. 1, 1908, for interest on 1st Consolidated Mtg. Bonds	234,000.00
Nov. 1, 1908, for rehabilitating property and completion of Sugar Creek & Northern Railroad.....	1,820,000.00
Mar. 1, 1909, for interest on 1st Consolidated Mortgage and taxes.....	373,000.00
May 1, 1909, for completion of shops at Brewster, and rehabilitation and improvement of property.....	1,429,000.00
Total.....	$3,963,350.00

and has issued therefor Receiver's certificates maturing at different times but all maturing before May 1, 1911, and that under and pursuant to the orders of the court authorizing the issuance of said Receiver's certificates the income arising from the operation of the

railroads constituting the receivership estate is especially pledged for the payment of the principal and interest of said certificates.

Your orator further shows that the amount required annually in order to meet the interest on said funded debt, equipment, obligations and said Receiver's certificates, and the other payments
6 required under the equipment obligations is as follows:

(*a*) Annual interest on funded debt.....	$1,033,030.00
(*b*) Principal payment on equipment obligations...	245,000.00
(*c*) Interest on equipment obligations.....	121,230.42
(*d*) Interest on Receiver's certificates.....	234,112.00
	$1,633,372.42

Your orator further shows that no dividends have been paid by the said The Wheeling & Lake Erie Railroad Company on any of its outstanding capital stock, common, first preferred or second preferred, at any time since the organization of said company, and that the said railroad company has defaulted in the payment of interest on its funded indebtedness as hereinafter set forth.

V.

Your orator further shows that, on or about the 8th day of June, 1908, the National Car Wheel Company, of New York, filed its bill of complaint against The Wheeling & Lake Erie Railroad Company in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, alleging the insolvency of the defendant the Wheeling & Lake Erie Railroad Company, and the necessity for the intervention of a court of equity, in order to marshal liens and protect all parties interested in the property of the said railroad company, and praying for the appointment of a receiver. To which said bill of complaint The Wheeling & Lake Erie Railroad Company filed its answer admitting its insolvency and joining in the request of the complainant for the court to take possession of its property through the instrumentality of a receiver, and to operate and control said railroad and to preserve and manage the entire property and business thereof. Thereupon the court appointed this complainant, B. A. Worthington, receiver of all and singular the property, assets, rights and franchises of The Wheeling & Lake Erie Railroad Company, including all railroads and other property and assets, rights and franchises of whatsoever kind and description and wheresoever situated, owned or operated by the said railroad company, authorizing and directing the said Receivership to keep the railroads and other property of said The Wheeling & Lake Erie Railroad Company employed and used as the same were theretofore used, and to continue the operation of said railroads, and to institute and prosecute all such suits as might be necessary in the judgment of the Receiver for the proper protection of the property and trusts thereby vested in him and of the business placed in his charge; that the
7 complainant herein, on the 9th day of June, 1908, filed with the Clerk of the United States Circuit Court for the Northern

District of Ohio, Eastern Division, a bond in the sum of $100,000, which said bond was approved by the judge of said court, and thereupon this complainant took possession of the said property, assets and franchises of The Wheeling & Lake Erie Railroad Company, and ever since has been and is now in possession of and operating the said railroads and property under and pursuant to the orders of said court.

Your orator further shows that subsequently, The Wheeling & Lake Erie Railroad Company having defaulted in the payment of the principal and interest due August 1, 1908, on its certain 3-year gold notes aggregating $8,000,000.00 provided for in the deed of trust from The Wheeling & Lake Erie Railroad Company to the New York Trust Company, Trustee, dated August 1, 1905, and secured by $12,000,000.00 of the General Mortgage Bonds of said company issued under and pursuant to the terms of the mortgage or deed of trust from The Wheeling & Lake Erie Railroad Company to the Central Trust Company of New York, trustee, and having also defaulted in the payment of interest on said $12,000,000 of General Mortgage Bonds the Central Trust Company, of New York, as trustee under said mortgage or deed of trust dated August 1, 1905, securing said $12,000,000 of bonds, by leave of court first had and obtained, filed its bill of complaint against The Wheeling & Lake Erie Railroad Company in the United States Circuit Court for the Northern District of Ohio, Eastern Division thereof, praying for a foreclosure of its said mortgage and for the appointment of a receiver. Whereupon the said court, on the 18th day of September, 1908, appointed the complainant herein, B. A. Worthington, as receiver of all the property, rights and franchises of said The Wheeling & Lake Erie Railroad Company, with authority to continue to operate said property and with the same power given in the order appointing the said B. A. Worthington receiver made and entered upon the bill of complaint of the National Car Wheel Company as aforesaid, and consolidated the said National Car Wheel cause with the action commenced by the Central Trust Company of New York, trustee, and docketed the same as "Consolidated Cause; Central Trust Company of New York, Trustee, complainant vs. The Wheeling & Lake Erie Railroad Company, defendant; No. 7603;" that said B. A. Worthington, under and pursuant to the said order made and entered
8 in the said foreclosure proceeding, took possession of all the property of said The Wheeling & Lake Erie Railroad Company, and ever since has been and now is in possession of the same; and, in all of the matters and things hereinbefore and hereinafter referred to, acts under and pursuant to the orders appointing him as such Receiver, and other orders made from time to time by said court prescribing the manner in which your orator shall further discharge his duties respecting the property constituting the receivership estate.

VI.

Your orator further shows that there are three coal-producing districts situated on and served by the railroad constituting the receivership estate, all in the State of Ohio, and known as (*a*) the Massillon

District, situated in Stark and Wayne counties, producing a very fine quality of coal suitable for domestic purposes; (*b*) the Middle District, situated in Coshocton, Holmes, Carrol and Tuscarawas counties, likewise producing a coal suitable for domestic purposes; and (*c*) the No. 8 Ohio District, situated in Jefferson, Harrison and Belmont counties, producing a coal particularly adapted for use by industries and railroads in producing steam for manufacturing and other purposes. The defendants and other members of The Pittsburg Vein Operators' Association of Ohio are interested in mining operation in said No. 8 Ohio District.

Bituminous coal from all districts, for tariff purposes, is classified by your orator as (*a*) railway fuel; (*b*) lake-cargo; (*c*) commercial coal. The first comprises coal sold to railroad companies at junction points on the railroad constituting the receivership estate, and used by said connected railroads for engine and other fuel purposes. The second includes coal going from mines in the State of Ohio to points in the vicinity of the head of the Great Lakes and thence to points in the northwestern part of the United States, via rail from mines to ports on Lake Erie in Ohio known as the "lower lake ports" and thence by vessel to ports at the head of the Great Lakes and known as "upper lake ports." The third comprises coal used for commercial and domestic purposes either at points on your orator's railroad and known as local coal, or at points on the lines of connecting carriers known as through coal, not included in the first two classes.

VII.

Your orator shows that the "lake-cargo coal" transported over the railroad constituting the receivership estate moves through either the Cleveland or Huron port; that very little lake cargo coal goes through the Cleveland gateway owing to the fact that your orator's
9 docks at such port are situated so far up the Cuyahoga River as to make towage necessary for vessels coming to said docks, thereby requiring persons using your orator's railroad in the lake cargo trade at such port to incur an expense not required if they use docks of other railroads at Cleveland or the dock of your orator at Huron; that practically all of the lake cargo coal moved over your orator's railroad, for the reasons above stated moves to the northwest to points outside the State of Ohio via Huron, Ohio, where your orator has large dock facilities capable of handling a large amount of lake-cargo coal in an economical and efficient manner; and that the average distance from the various mines in the No. 8 District served by your orator's railroad to the Huron dock is approximately 155 miles.

Your orator further shows that he has in operation at the docks in Cleveland and Huron, expensive machinery and appliances for unloading said lake-cargo coal from cars and loading said coal into the holds of vessels, and for trimming the said coal when in the holds of vessels, so that it may be properly and safely transported by said vessels from lower Lake Erie ports to upper lake ports beyond the State of Ohio and that greater effort is required to handle said lake-cargo coal than is required to handle any other kind of coal on your orator's railroad.

VIII.

Your orator further shows that, at the time of the filing of the complaint with the Railroad Commission of Ohio as hereinafter set forth, and ever since, your orator has had in effect on the railroad constituting the receivership estate, as appears from the tariffs duly issued by your orator and filed with the Interstate Commerce Commission in the manner required by the laws of the United States in such cases made and provided, and particularly by the Act to Regulate Commerce passed March, 1887, and acts amendatory thereof and supplementary thereto, which said tariff was issued March 27, 1908, effective May 1, 1908, I. C. C. No. 24, pages 5, 15 and 175, a rate on "lake-cargo coal" moving from mines in Ohio to points in the northwest outside of the State of Ohio of 90 cents a ton, carload lots, from mines No. 8 District f. o. b. vessels Huron and Cleveland, which said rate of 90 cents is applicable only to coal moving in interstate commerce from the mines in the No. 8 district to points in the northwestern part of the United States outside of the State of Ohio, via rail to lower Lake Erie ports and thence by vessels up the Great Lakes as aforesaid; that all the operators on your orator's railroad for several years past have engaged in said lake-cargo trade, and, in order to properly conduct said interstate commerce in lake-cargo coal have acquired or control docks, or have close relations with persons owning or controlling docks at the head of the Great Lakes; that said coal operators have availed themselves of said lake cargo-rate in conducting their said interstate commerce in lake-cargo coal trade, during all of said years, and, in pursuance thereof, have made and make it the custom and practice, at the opening of navigation in each year or a short time prior thereto, to arrange with persons owning or controlling vessels plying upon the Great Lakes for the vessel carriage to take care of the lake-cargo coal and operators expect to transport from the mines in the No. 8 District of Ohio to points outside of the State of Ohio via your orator's railroad and said vessels, all of which is known to your orator and to persons owning or controlling said vessels, and is done by and with your orator's consent and approval; that all such coal is billed as "lake-cargo coal" and actually moves through Huron and Cleveland ports to points without the State of Ohio, and the operators and persons owning vessels, as well as your orator, in taking part in said lake-cargo trade, not only intend to but actually do engage in interstate commerce; that said lake cargo coal is by said parties, to-wit: your orator, the operator and vessel-owner, actually transported from mines in Ohio to docks at the head of the Great Lakes outside of the State of Ohio by continuous carriage, broken only by the necessary unloading from cars into vessels; and that said lake-cargo coal, after leaving the mines in the No. 8 District in Ohio, is continuously in the possession of the carriers performing the transportation service until delivered to the consignee at the point of destination at the head of the Great Lakes, outside of the State of Ohio.

IX.

Your orator further shows that said lake-cargo rate is in fact a "proportional rate" applicable only to coal moving from points in Ohio to points outside the State of Ohio via Huron or Cleveland, as above set forth, and if coal is billed to Huron as Lake-cargo coal on said lake-cargo rate, and the consignee or owner subsequently changes its destination or diverts it to use at Huron, either en route or at Huron before it is loaded into vessels by your orator, the said lake-cargo rate is not applicable, but, on the contrary, the commercial rate to such changed destination applies, which, in case the coal is used at Huron, would be the commercial rate from the No. 8 District to Huron, to-wit: one dollar per ton in carload lots.

Your orator further shows that the said lake-cargo rate re-
11 quires your orator to perform for the shipper and the vessel owner a loading service, to-wit: unloading said lake-cargo coal from cars and putting the same into the holds of vessels thereby requiring your orator, by and with the consent of the vessel-owner, to go into the hold of the vessel engaged in interstate commerce to trim the said coal, that is, properly distributing the coal in the hold of the vessel so that the vessel may safely proceed on its interstate journey to points on the Great Lakes outside the State of Ohio; that unless your orator performs such loading and trimming service it would be necessary either for the shipper or the vessel-owner to do so, and that said loading and trimming service is an integral part of the interstate commerce engaged in by the vessel-owner, the coal operator and your orator in the transportation of said lake cargo coal; that said unloading and loading and trimming and the rail carriage constitute an entire service performed by your orator incapable of division under the contract between the parties evidenced by the tariff aforesaid, and required to be performed by your orator for the shipper of lake-cargo coal and the owner of the vessel in connection and as a part of the interstate commerce engaged in by the parties carrying on said lake-cargo trade, to-wit: the coal operator, your orator, and the owner of the vessel.

X.

Your orator further shows that there is a coal-producing district in Allegheny and Washington counties in the western part of the state of Pennsylvania, known as the Pittsburg District. The coal produced in said district is similar to that mined in the No. 8 District of Ohio; that said Pittsburg District is served principally by the Pennsylvania Company, New York Central Lines and the Baltimore & Ohio Railroad, and that the short-line workable mileage from said district to lower Lake Erie Ports via which the lake-cargo coal may be shipped from said Pittsburg District to the head of the Great Lakes in competition with the lake-cargo coal from the No. 8 Ohio District, is approximately 160 miles; that the ports of said railroads (not including your orator's) so serving said Pittsburg District are Conneaut, Ashtabula, Fairport, and Cleveland; that your orator's lines of railroad connect with the railroad of the Wabash-Pittsburg Terminal Railway Company at Pittsburg Junction, Ohio, which said last

named railroad extends from Pittsburg Junction to Pittsburg Pennsylvania, and there connects with the railway of the West Side Belt Railroad Company, a belt-line railroad in the vicinity of Pittsburg; that said Wabash-Pittsburg Terminal Railway Company and
12 the West Side Belt Railway company serve some of the mines in the said Pittsburg District, and their said railroads, in connection with the railroad constituting the receivership estate, form a through route from said Pittsburg District to Huron gateway for the transportation of lake-cargo coal from mines in said Pittsburg District to points in the northwest; that there are a number of mines situated on the said Wabash-Pittsburg Terminal and West Side Belt railroads which have no other railroad facilities except such as are afforded by said railroads and are dependent entirely upon the said railroads of the Wabash-Pittsburg Terminal Railway Company, the West Side Belt Railroad Company and your orator for transportation of lake-cargo coal; that all railroad companies so serving the said Pittsburg District including your orator have in effect a lake-cargo rate from said district to lower Lake Erie ports applicable to coal moving to the northwest via rail and vessel which is 3 cents higher per ton than the rate on lake cargo coal from the said No. 8 Ohio District.

Your orator shows that a large portion of the coal moving over your orator's railroad not included in said lake-cargo trade goes to points outside of the State of Ohio; that the necessary effect of a reduction in the lake-cargo rate will be to require your orator to make a corresponding reduction in all its other interstate rates; that he entire coal-rate structure is so adjusted, both as to state and interstate commerce, as to make it impossible to reduce the lake-cargo rate without making a corresponding reduction in all coal rates, both state and interstate, and the effect of any regulation of the said lake-cargo rate is to directly affect the rates on interstate commerce engaged in by your orator, will necessarily prohibit your orator from engaging interstate commerce except at great loss of revenue, and will constitute a direct regulation of said interstate commerce rates in effect at present, all of which are reasonable and just; and that if the proposed lake-cargo rate set forth in the order of the Railroad Commission, herein referred to, is made effective, the result will be either to prohibit your orator from engaging in such interstate commerce, or if engaged in, to do so at great loss of revenue.

XI.

Your orator shows that the result of the operation of The Wheeling & Lake Erie Railroad since the organization of the company to the end of the fiscal year, June 30th, 1909, is as follows:

(Here follows tabular statement marked page 12½.)

13 While the foregoing shows a net income for the year ending June 30, 1909, of $27,431.75, an examination of the operating statistics will show that this apparent net income is due to the fact that no interest was paid by your orator upon the $8,000,000.00 three-year gold notes of the said The Wheeling & Lake Erie Railroad Company and that interest amounting to $311,920 was paid out of the proceeds of Receiver's Certificates; that if your orator had paid the interest on said three-year notes and other interest taken care of from Receiver's Certificates aforesaid, out of earnings of your orator's property, as proper operation of the property, the deficit for the year 1909, would have been $684,488.25. The net income shown for the fiscal year from 1900 to 1904 inclusive and 1906 and 1907 was used by The Wheeling & Lake Erie Railroad Company in making improvements and extensions of its property to such an extent that the company was not in a position to use said net income for the purpose of taking care of the deficits resulting from the operation of the railroad for the years 1905 and 1908. The greater portion of the income denominated "Other incomes" in the foregoing statement was obtained from The Wheeling & Lake Erie Railroad Company from the sale of certain property acquired by it from the proceeds of net income earned in previous years and used in order to take care of the interest on the funded debt of the company. During the Receivership the Receiver has been required to expend $761,562.39 proceeds of Receiver's Certificates for the purpose of rehabilitating the property made necessary because of the inability of the railroad company in previous years to properly maintain the railroad out of the income.

If proper consideration is given to the foregoing, the operation of the property constituting the Receivership estate making provision only for the payment of interest on funded indebtedness with no provision for any dividend on stock would show a deficit for the said period from 1900 to June 30 1909, of $549,708.22 which is approximately $54,970.82 per annum.

XII.

Your orator further shows that an analysis of the earnings and expenses and freight statistics for the years 1907, 1908 and 1909, when the property was being operated by The Wheeling & Lake Erie Railroad Company and your orator respectively is as follows:

14 Account.	1907.	1908.	1909.
Gross Operating Revenue....	$6,124,206.78	$5,379,001.24	$5,633,644.99
Operating Expenses.			
Maintenance of Way and Structures.....	728,469.13	667,479.45	617,956.55
Maintenance of Equipment ..	1,041,571.69	1,148,755.29	1,380,977.67
Traffic Expenses.....	.....	79,757.51	74,230.66
Transportation Expenses	2,197,808.78	2,249,368.10	1,947,807.09
General Expenses.....	157,520.30	152,883.68	179,745.87
Total.....	$4,125,369.90	$4,298,244.07	$4,200,717.84
Percentage of Operating to Operating Revenue.....	67.36	79.64	74.56
Net Operating Revenue.....	$1,998,836.88	$1,098,757.17	$1,432,927.15
Freight Statistics.			
Gross Freight Revenue.....	$5,440,727.46	$4,455,438.81	$4,804,421.95
Revenue Tons Carried.....	9,608,590	7,818,298	8,331,704
Revenue Ton Miles.....	1,130,880,732	933,018,545	889,916,252
Company Ton Miles.....	52,957,373	44,246,526	46,716,296
Total Revenue and Company ton Miles.....	1,183,838,105	977,265,071	939,632,548
Gross Ton Miles including Wt. of Engine and Tender.....	2,425,689,703	2,122,059,948	2,003,558,985
Average Distance Haul one Ton (revenue).....	117.7	119.3	106.8
Freight Train Miles.....	1,869,406	1,624,261	1,510,844
Mileage of Loaded Cars	37,715,458	31,232,144	30,578,882
Mileage of Empty Cars.....	19,781,737	19,355,226	17,165,877
Unbalanced Traffic, per cent.	41.36	44.62	40.27
Average Net Tons per Train Mile.....	633	602	620
Average Net Tons per Locomotive Mile.....	571	552	568
Average Gross Tons per Train Mile.....	1,298	1,306	1,326
Average Gross Tons per Locomotive Mile.....	1,169	1,199	1,216
Average Tons per Loaded Car	31.39	31.26	30.63
Average Loaded Cars per Train.....	20.18	19.23	20.24
Average Empty Cars per Train.....	10.58	11.92	11.36
Average Revenue per Ton, cts.	56.62	56.98	57.66
Average Revenue per Ton Mile, etc.....	.481	.478	.540

XIII.

Your orator further shows that under the interstate commerce classification, operating expenses are classified as (*a*) maintenance of way and structures; (*b*) maintenance of equipment; (*c*) traffic expenses; (*d*) transportation expenses; and (*e*) general expenses; and these various classes are further subdivided, so that there are in all one hundred and five items included in the different subheads as aforesaid; that approximately 60 per cent of the
15 said expenses are fixed and must be taken care of, irrespective of the volume of business transported, while approximately 40 per cent of the said expenses fluctuates with the volume of traffic. Approximately 20 per cent to 25 per cent of all operating

expenses can be allotted to a particular train, while 75 per cent to 80 per cent is of a general character incident to all services and incapable of being allotted to any particular train or movement except upon an arbitrary basis, and that therefore such particular portion of expenses, to-wit: 75 per cent to 80 per cent is known as joint costs, and there is no proper unit of measurement by which the proportion of such joint costs may be charged to a particular traffic. Various units have been suggested, such as train-miles, car-miles, ton-miles, and revenue basis, but each and every such unit overlooks the fact that a great many commodities either cannot pay such theoretical proportion of these joint costs, or that competition requires the railroad to haul some commodities at a rate insufficient to cover such theoretical proportion of such joint costs and the relation between said units and the proportion chargeable to a particular traffic using any particular unit, or any combination of such units, varies from time to time, depending upon operating cost and volume of business.

Your orator further shows that the cost of moving traffic is variable, perhaps never twice the same, depending upon train-loads, track, traffic density, maintenance, and other considerations, so that there are varying units at different periods among which to apportion the said 20 per cent to 25 per cent of operating expenses known as direct expenses incident to handling a particular train, and consequently the actual cost of handling all traffic is unknown until total operating expenses and total volume of business have been ascertained. Your orator shows that the great body of expenses on a railroad is a distinct thing from the great body of earnings, and that the only practical measure of cost is the relation that the cost of handling all traffic bears to all revenues; that is, the ratio of all operating expenses in the aggregate to all the revenues in the aggregate.

The empty train returning to the originating point requires certain expenditures which cannot be charged to any particular traffic. Any attempt to arrive at the cost of the movement of a particular commodity which moves over the main line by the use of any one of any combination of units of measurement in distributing the joint costs, ignores the cost of maintenance and operation of branch lines (of which your orator's railroad has several) where
16 the arbitrary costs units are usually very much higher than on the main line. Yet these branch lines serve as feeders to the main line and are of great value to the company because the density of traffic on the main line is largely due to such feeders and without them the main line would only get such business as would be tributary to itself and that by reason of the foregoing it is impossible to ascertain the cost of moving a particular traffic.

Your orator shows that the total operating revenue of the property constituting the receivership estate, as set forth above, has been insufficient, since 1900, and still is insufficient to pay the operating expenses of said property, and the fixed charges accruing upon its funded debt and the receivers' certificates issued by your orator as aforesaid: that the property is reasonably worth a sum far in ex-

cess of the aggregate amount of said funded indebtedness and receiver's certificates and that the owners of and parties interested in the property constituting the receivership estate have at no time received that return upon their property to which they have been and are entitled.

XIV.

Your orator further shows that an analysis of the gross freight earnings obtained by your orator from the operation of the property constituting the receivership estate for the year ending June 30, 1909, classifying the tonnage as appears in said statement, the revenue, the average-haul miles, the average rate per ton in cents, and the average rate per ton mile in cents is as follows:

	Tons.	Ton miles.	Revenue.	Av. haul, miles.	Av. rate per ton, cents.	Av. rate per ton per mile in cents.
Coal	3,893,760	501,269,869	$2,538,053.05	128.	60.	.466
Ore	568,850	80,014,959	282,899.16	140.6	49.7	.353
Flux stone	100,422	17,272,673	36,326.41	172.	36 2	.210
Furnace products	442,484	79,129,490	422,670.76	179.	95.5	.534
Brick	152,034	16,589,145	90,348.09	109.1	59.4	.544
Flour	30,340	4,970,400	16,295.07	163 6	53.7	.330
Selected Comdts	244,478	20,585,434	169,783 43	84.2	69 4	.825
Other Comdts	2,899,336	170,084,285	1,448,045.98	58.6	49 9	.851
Total Tonnage and Revenue	8,331,704	889,916,252	$4,804,421.95	106.8	57.7	.540

That the said ore flux-stone and flour move eastwardly in the direction of empty car movement, and is handled in cars that would otherwise be moved empty, and are moved by engines that would otherwise handle no revenue tonnage. The rate on iron ore is fixed by shorter competitive lines, so that your orator is either compelled to make the same rate or go without the business. The rate
17 on limestone is fixed by competition with quarries located in Eastern Ohio and Western Pennsylvania, which rate your orator is required to meet in order to secure the tonnage. An increase in the rate on either product would place the steel-producing mills in the Ohio Valley located on your orator's line of railroad, in a position where they could not compete with the steel-producing mills in the Pittsburg district, and your orator would therefore not receive from the steel-producing mills in the Ohio valley the finished product which your orator now receives for transportation and which yields revenue considerably in excess of that on the raw material. The rate on flour is governed by competitive conditions, not only by through rates, but by different producing centers. It is to the advantage of the receivership estate that the said ore, flux-stone and flour should be taken at the said low rates rather than to go without the tonnage, inasmuch as said low rates yield your orator more than the extra expense incurred in handling the particular traffic; that is, more than the direct expenses as defined above, thereby placing your orator in funds applicable to the payment of joint costs which otherwise would be put upon the other traffic.

While the total rate per ton mile on all classes of freight for 1909 is 5.40 mills, if coal, iron ore, flux-stone and flour are eliminated from said total tonnage and revenues, the rates on all other commodities yield a revenue of 7.44 mills per ton mile, and this notwithstanding the fact that a large portion of the tonnage included under the head "Furnace Products" moves from Cleveland to Toledo, a distance of 210 miles, yielding a return of 4.1 mills per ton miles in competition with the Lake Shore & Michigan Southern company, whose line is 113 miles, taking the same rate and yielding it an earning of 7.09 mills. The low average rate per ton mile on all traffic is incident to the fact that your orator's railroad in the majority of instances, is the long-haul route, and is required to compete with short-haul railroads at rates lower than your orator would be willing to carry the same tonnage did not competitive conditions require, but that it is to the advantage of the receivership estate that your orator should be permitted to meet such competitive conditions whenever said competitive rates will yield more than enough to pay the direct operating expenses and leave a sum applicable to the payment of the joint operating expenses, thereby redounding to the benefit of the non-competitive traffic.

Your orator further shows that the railroad constituting the receivership estate is used not only for the transportation of commodities moving between points within the state of Ohio,
18 but commodities moving from the points within to points without the state of Ohio.

XV.

Your orator shows that an analysis of the total coal tonnage and revenue by districts shipped over the line of railroad of your orator for the fiscal years ending June 30, 1907, and 1909 is as follows:

1—No. 8 District.

Nature of shipment.	Tons.	Revenue.	Average haul, miles.	Average rate per ton per mile in cents	Per cent.
A—Local	432,402	$317,922.05	117	.62	9.47
B—Through	281,206	206,179.44	183	.39	6.16
C—Lake	455,842	410,257.80	155	.58	9.98
D—R. R. Fuel	1,080,579	700,823.46	183	.35	23.88
2—Middle District.					
A—Local	487,273	285,158.96	71	.83	10.67
B—Through	23,682	13,132.32	134	.42	.52
C—Lake	4,446	3,335.21	128	.59	.10
D—R. R. Fuel	13,700	7,064.50	127	.41	.20
3—Massillon District.					
A—Local	237,351	149,150.20	89	.70	5.20
B—Through	136,603	59,597.67	85	.51	2.99
4—W. P. T.					
B—Through	395,946	186,733.37	165	.29	8.45
C—Lake	903,863	423,346.07	135	.35	19.79

Nature of shipment.	Tons.	Revenue.	Average haul, miles.	Average rate per ton per mile, in cents.	Per cent.
5—Other Connections.					
B—Through	113,407	33,201.91	42	.60	2.49
					100.0
6—Total.					
A—Local	1,157,026	732,231.21	91.8	.71	25.34
B—Through	940,844	492,844.71	141.8	.37	20.60
C—Lake	1,364,151	836,939.08	141.6	.43	29.87
D—R. R. Fuel	1,104,279	707,887.96	182.8	.35	24.19
Less overcharges and W. P. T. Guarantee	4,566,300	$2,789,902.96 230,934.03			100.00
		2,558,968.93			
19					
1—No. 8 District.					
A—Local	306,195	$239,727.76	107	.73	7.86
B—Through	607,207	374,297.98	150	.41	15.59
C—Lake	387,705	350,885.78	155	.28	9.96
D—R. R. Fuel	963,318	662,761.27	181	.38	24.74
2—Middle District.					
A—Local	430,515	234,016.53	64	.84	11.06
B—Through	18,851	8,315.16	107	.41	.48
C—Lake	1,352	984.06	134	.54	.03
D—R. R. Fuel	13,156	7,564.70	127	.45	.34
3—Massillon District.					
A—Local	138,530	85,566.57	72	.85	3.56
B—Through	68,528	30,697.61	89	.50	1.76
C—Lake	508	355.92	90	.77	.01
4—W. P. T.					
B—Through	256,404	104,507.09	102	.39	6.59
C—Lake	462,776	218,288.01	135	.35	11.89
5—Other Connections.					
B—Through	238,675	66,351.12	35	.80	6.13
					100.00
6—Total.					
A—Local	875,300	559,310.86	81	.79	22.48
B—Through	1,189,665	584,168.96	112	.43	30.55
C—Lake	852,321	570,513.77	142	.47	21.89
D—R. R. Fuel	976,474	670,325.97	180	.38	25.08
	3,893,760	$2,384,319.56	...	....	100.00
Less Overcharges		46,266.51			
		$2,338,053.05			

XVI.

Your orator further shows that the average distance from the No. 8 District to the docks at Huron is approximately 155 miles; that the average distance from Huron to points in the Northwest where said coal is consumed is approximately 900 miles, making a total distance of approximately 1,050 miles; that the average water rate in force during the period of navigation on the Great Lakes is approximately 30 cents, making the total carrying charge on said coal from the mines in the No. 8 District to the point of consumption at the head of the Great Lakes approximately $1.20, that the lake cargo rate on your orator's railroad on No. 8 coal for the past twenty years has been as follows:

Year.	Rate.
1888	85c f. o. b. dock
1889	85c f. o. b. dock
1890	85c f. o. b. dock
1891	85c f. o. b. dock
1892	85c f. o. b. dock
1893	90c f. o. b. dock
1894	90c f. o. b. dock
1895	87½c f. o. b. dock
1896	87½c f. o. b. dock
1897	87½c f. o. b. dock
1898	87½c f. o. b. dock
1899	90c f. o. b. dock
1900	77½c f. o. b. dock
1901	73c f. o. b. vessel
1902	75c f. o. b. vessel
1903	85c f. o. b. vessel
1904	85c f. o. b. vessel
1905	85c f. o. b. vessel
1906	85c f. o. b. vessel
1907	90c f. o. b. vessel
1908	90c f. o. b. vessel
1909	90c f. o. b. vessel

That the reduction in rate from 1900 to 1903 was due to rate wars; that the increase in 1907 was required because of the great increase of cost of all things entering into the transportation business; and that such increase in rate was in the same proportion as the increase in rates on all other commodities transported by your orator made at the same time.

XVII.

Your orator further shows that the lake-cargo tonnage from mines on your orator's railroad has increased steadily for the past several years, the tonnage being as follows:

1907	Tons	Ave. Rate	Revenue	Rate	Revenue	Loss
Lake Coal, W. & L. E	460,288	†99.8c	$413,593.01	70c	$322,201.60	$91,391.41
" " W. S. B	790,257	46.2c	365,860.12	31.8c	251,301.72	114,558.40
" " W. P. T	113,606	59.6c	57,485.95	43.5c	49,418.61	8,067.34
All Other Coal	3,319,675	51.8c	1,722,029.85	41.8c	1,387,624.15	334,405.70
	4,683,826		$2,558,968.93		$2,010,546.08	$548,422.85
1908						
Lake Coal, W. & L. E	447,684	†90.5c	$404,756.68	70c	$313,342.80	$ 91,392.88
" " W. S. B	640,965	45 c	288,811.65	31.8c	203,816.87	84,994.78
" " W. P. T	142,986	54.7c	78,312.60	43.5c	62,198.91	16,113.69
All Other Coal	2,960,126	56.4c	1,670,490.02	46.4c	1,373,498.46	296,991.56
	4,191,711		$2,442,350.95		$1,952,858.04	$489,492.91
1909						
Lake Coal, W. & L. E	389,565	†90.4c	$352,225.76	70c	$272,695.50	79,530.26
" " W. S. B	435,644	46.5c	202,817.51	31.8c	138,534.79	64,282.72
" " W. P. T	27,112	57 c	15,470.50	43.5c	11,793.72	3,676.78
All Other Coal	3,041,439	58.1c	1,767,538.28	48.1c	1,462,932.16	304,606.12
	3,893,760		2,338,052.05		$1,885,956.17	$452,095.88

†Excess over 90c per ton caused by vessel fuel rate of 95c included in Lake Coal, and rate o less than 90c accounted for account of vessel fuel rate being 85c in year 1907.

Year.	Tons.
1906	235,121
1907	478,438
1908	447,047
1909	486,322

and that the lake-cargo output from all Ohio districts on all railroads as compared with the lake-cargo output from the coal districts in Pennsylvania and West Virginia is as follows:

21

State.	District.	1903.	1908.	Percentage of increase.
Ohio	No. 8	536,738	1,316,946	145 %
Ohio	Hocking	1,631,485	1,378,465	15.5% *
Pa.	Pittsburg	5,460,215	7,541,611	38 %
W. Va.	Fairmount	1,119,288	1,226,329	9.6%
W. Va.	Kanawha	393,115	1,451,379	269 %
W. Va.	Thacker	344,575	843,441	144 %

* Decrease.

XVIII.

Your orator further shows that said rate on lake-cargo coal of 90 cents in car load lots from mines in the No. 8 district f. o. b. vessel at Huron and Cleveland is a reasonable and just rate; that it bears a proper relation to all other rates in force on the railroad operated by your operator; that it moves in the lake-cargo traffic freely, as set forth above, and that a reduction in said rate will necessarily require a complete readjustment of all coal rates, both state and inter-state that a reduction in the lake cargo rate such as is proposed in the order of the Railroad Commission of Ohio, hereinafter referred to, to-wit: 20 cents, will require your orator to reduce his proportion of the lake-cargo rate on coal coming from the Pittsburg district at least 15 cents per ton, and will require your orator to further reduce all other coal rates approximately 10 cents a ton, resulting in a decrease in the earnings of your orators' railroad of approximately half a million dollars per year, and that said proposed rates as applied to the fiscal years 1907, 1908 and 1909, would have had the effect as shown in the following statement:

(Here follows table of rates, marked page 22.)

23 Your orator further shows that the majority of rates on other commodities transported over the said railroad, due to competitive conditions over which your orator has no control, and due to the fact that your orator has the long-haul line in so many instances, are so fixed that it is impossible for your orator to raise said rates and keep the tonnage, which it is to the advantage of the receivership estate, as set forth above, to haul even at these low rates rather than to go without; that the facilities of your orator are at the present time taxed to the utmost making it impossible to transport any more lake-cargo coal from the No. 8 district than has been carried for the past two or three years, unless other tonnage is refused from other industries served by your orator; that all the rates in force on your orator's railroad bear a proper relation to each other and bear their just proportion of operating expenses, taking into consideration all the circumstances and conditions surrounding the transportation of the same; that your orator has no way to make up the loss of revenue incident to the proposed reduction in the lake-cargo rate, and the effect of a reduction in the lake cargo rate, with the resulting reduction to all other coal rates, will be to further reduce the income of the receivership estate, and by just that amount, to-wit: approximately $500,000, prevent the said receivership estate from earning enough to pay the interest upon the funded debt of said the Wheeling & Lake Erie Railroad Company, which debt, in the aggregate, is far below the actual value of the property, and interest on the receiver's certificates issued as aforesaid, without giving any consideration whatever to the return to which the owners and holders of the capital stock of said company may be entitled by virtue of their respective holdings; that said proposed rate of 70 cents f. o. b. vessel Huron and Cleveland provided for in the order of the commission hereinbefore set forth in and of itself is unjust and unreasonable, and will be unremunerative; that the railroad constituting the receivership estate is being managed and operated in a careful and economic manner and with due regard to the rights of the shipping public and the owners of the property; and that the effect of said order of the Railroad Commission of Ohio, as applicable to the railroad constituting the receivership estate, will be to take the said property without due process of law and confiscate it for the benefit of the public without compensation to the owners or persons interested therein.

24 XIX.

Your orator further shows that the No. 8 district of Ohio is served not only by the railroad constituting the receivership estate, but by the railroads of the Baltimore & Ohio Railroad Company, the Cleveland, Lorain & Wheeling Railroad Company and the Pennsylvania Company; that all such railroad companies have lake ports on Lake Erie through which their lake-cargo coal from the mines on their railroads moves enroute to points in the Northwest outside of the state of Ohio; that such lake-cargo coal moving from the No. 8 district over the said other railroads constitutes approximately 75 per cent of the total lake-cargo tonnage moving from the No. 8 Ohio

District, leaving only 25 per cent to be transported over your orator's railroad; that the said Baltimore & Ohio, Cleveland, Lorain & Wheeling, and Pennsylvania companies have in force the same lake-cargo rates from the No. 8 district, except some of the companies to some lake ports quote a rate "f. o. b. dock" instead of "f. o. b. vessel" in which case the rate is 85 cents f. o. b. dock; that the order of the Railroad Commission of Ohio hereinafter referred to will not require such other railroads to change their respective lake-cargo rates on coal moving from the No. 8 district to lower Lake Erie ports enroute to the Northwest over their respective railroads; that a large number of the operators, members of the defendant Pittsburg Vein Operators' Association of Ohio, have mines located on said other railroads and engage in the lake-cargo trade, shipping the coal via such other railroads and vessels up the Great Lakes; that no complaint has been filed by the defendants herein or by any other person with the Railroad Commission of Ohio or the Inter-State Commerce Commission against said other railroads or any of them respecting their existing rates on lake-cargo coal, which are as above stated, nor has the Railroad Commission of Ohio on its own initiative instituted any such complaints against said other railroad companies; and that the effect of the enforcement of the order of the Railroad Commission of Ohio hereinafter referred to will be to work a discrimination against the property constituting the receivership estate, in that it will require your orator to transport lake cargo coal from the No. 8 District for less than the amount other railroads, engaging in the same business, in the same district, and under similar circumstances, are permitted under the law to charge, thereby depriving your orator of the property constituting the receivership estate without due process of law, and denying to said property the equal, full and just protection of the law.

25 XX.

Your orator further shows that on the 10th day of May, 1909, the Pittsburg Vein Operators' Association of Ohio filed a complaint with the Railroad Commission of Ohio against the Wheeling & Lake Erie Railroad Company, which was subsequently amended, alleging that the rate demanded, charged and collected by your orator upon coal transported from the mines located on and served by your orator's railroad in Jefferson and Harrison counties, Ohio, to the city of Cleveland and the village of Huron for shipment by vessel to various ports on the Great Lakes, to-wit: 85 cents per ton in car load lots f. o. b. Cleveland, and an additional charge of 5 cents per ton for transferring said coal from the railroad cars to lake vessels, was excessive, unjust and unreasonable per se and by comparison with other rates demanded, charged and collected by other railroads under similar conditions, and asking the Commission to investigate and to prohibit your orator from demanding charging and collecting said excessive, unjust and unreasonable rate and fixing what rate should be charged by your orator in lieu of said alleged unjust and unreasonable rate.

Your orator further shows that at no time has your orator main-

tained any such rate as that complained of in the amended complaint; that the rate which your orator has at all times maintained on lake-cargo coal is 90 cents f. o. b. vessel at Huron and Cleveland; that your orator answered said amended complaint alleging that he had in force on said railroad a rate upon coal transported over the line of said railroad to the city of Cleveland and to the village of Huron for re-shipment by vessel to points on the Great Lakes beyond the state of Ohio of 90 cents per ton in carload lots f. o. b. vessel at Cleveland and Huron and denying that said rates were excessive, unjust and unreasonable either in themselves or by comparison with other rates in force on your orator's railroad or other railroads under similar conditions.

Your orator further shows that the said complaint of the Pittsburg Vein Operators' Association of Ohio against your orator and the Wheeling & Lake Erie Railroad Company came on for hearing before the Railroad Commission of Ohio and your orator protested against the jurisdiction of the said Commission, alleging that the rate on lake-cargo coal from the No. 8 District to Huron and Cleveland ports, to-wit: 90 cents f. o. b. vessels at said ports was a rate applicable only to inter-state commerce engaged in by the complainants and your orator; that said Railroad Commission of Ohio
26 overruled your orator's objection to the jurisdiction of said Commission and proceeded to hear the complaint, and, after hearing the testimony, took the matter under consideration, and on the 28th day of February, 1910, made and entered an order, as follows:

"This matter came on for investigation upon the amended complaint of the Pittsburg Vein Operators' Association of Ohio against the Wheeling & Lake Erie Railroad Company and B. A. Worthington, as receiver of the Wheeling & Lake Erie Railroad Company, alleging that the rate charged, demanded and collected by said defendants for the transportation of coal, carloads, from the mines in the Number Eight District located on the line of said railroad company to the village of Huron and the city of Cleveland, both in the state of Ohio, is excessive and unreasonable, the answer of said defendants thereto and the evidence. After hearing the evidence, argument of counsel and upon due consideration thereof, the Commission find that the rate of 90 cents per ton f. o. b. vessel, charged, demanded and collected by defendants, the Wheeling & Lake Erie Railroad Company and B. A. Worthington as receiver of such railroad company for the transportation of coal, carloads, from the mines in Number Eight District located upon the line of such railroad in Ohio to the city of Cleveland and to the village of Huron, both located in Ohio, as shown by the tariff of the defendant railroad on file with the Railroad Commission of Ohio, is in each case excessive, unjust and unreasonable; and the Commission further find that a rate of 70 cents per ton f. o. b. vessel for the transportation of coal, carloads, by said defendants, the Wheeling & Lake Erie Railroad Company and B. A. Worthington as receiver of such railroad company, or by either of them, from said Number Eight Dis-

trict to the village of Huron, Ohio, and the city of Cleveland, Ohio, is a reasonable and just charge for that service.

"It is therefore ordered that said defendants, the Wheeling & Lake Erie Railroad Company and B. A. Worthintgon as receiver thereof, be and each of them is hereby notified and required to cease and desist from charging, demanding, collecting and receiving said excessive and unreasonable rate of 90 cents per ton f. o. b. vessel for the transportation of coal, carloads, from mines on the lines of said the Wheeling & Lake Erie Railroad Company in what is known as the Number Eight District in Ohio to the village of Huron, Ohio, and to the city of Cleveland, Ohio.

"It is further ordered that a rate of 70 cents per ton f. o. b. vessel, which the commission have found to be a just and reason-
27 able rate to be charged for the transportation of coal, carloads, from said Number Eight District to the village of Huron, Ohio, and the city of Cleveland, Ohio, be substituted for said rate of 90 cents per ton f. o. b. vessel, found by the commission to be unreasonable, which rate of 70 cents per ton f. o. b. vessel, as aforesaid, shall be charged, imposed, observed and followed in the future by said the Wheeling & Lake Erie Railroad Company and said B. A. Worthington, receiver of said company, and by each of them in lieu of and in substitution of said rate of 90 cents per ton f. o. b. vessel, found by the Commission to be unreasonable."

A copy of which order and the Commission's opinion were served upon your orator herein on the 23rd day of March, 1910.

A copy of the amended complaint, amended answer and opinion of said Commission are hereto attached, marked respectively "Exhibits 1, 2 and 3" and to which your orator begs leave to refer and to have treated as a part of this his bill of complaint the same as if fully set out herein.

Your orator further shows that, by virtue of the statutes of the state of Ohio in such cases made and provided such order of the Railroad Commission of Ohio is a law of the state of Ohio, and of its own force, is effective and becomes operative thirty days after service of the same upon your orator, and that your orator thereafter, to-wit: in this instance the 22nd day of April, 1910, is required to observe and follow the provisions of said order in respect to the rate on lake cargo coal form the No. 8 district to the city of Cleveland f. o. b. vessel and the village of Huron f. o. b. vessel under penalty of enforcement by the Railroad Commission of Ohio in a criminal action, subjecting your orator and his officers and agents to heavy fine, and under further penalty of a civil action by the Pittsburg Vein Operators' Association of Ohio or the members thereof to recover three-fold damages alleged to have been sustained by reason of your orator's failure to comply with said order or by proceedings on behalf of the Railroad Commission of Ohio in mandamus, injunction or other appropriate civil remedies.

Your orator shows that the said order of the Railroad Commission of Ohio, dated February 28th, 1910, above set forth, by which your orator is required to put into effect a rate of 70 cents on lake-cargo coal from the No. 8 district f. o. b. vessel Huron and Cleveland in

carload lots, is void, because contrary to and in violation of the Constitution of the United States, in this, to-wit:

That said law directly affects and interferes with this inter-
28 state commerce engaged in by your orator, over which the said Railroad Commission of Ohio has no authority or power inasmuch as the regulation of such commerce is vested in the Federal government under the provisions of the Constitution of the United States.

Your orator further shows that said order of the Railroad Commission of Ohio, above referred to, is void because contrary to and in violation of the Constitution of the United States, in this, to-wit: That the said law deprives the owners and persons interested in the property constituting the receivership estate of their property without due process of law, denies to them the equal protection of the law, and takes private property for public purposes without due compensation.

Your orator further shows that said order of the Railroad Commission of Ohio is void, inasmuch as the findings of the said Commission are contrary to the facts and are not supported by the testimony offered by the parties at the time of the hearing before said Commission, and the said Commission, in its said findings of fact and conclusions of law, has failed to give due and proper consideration to the traffic conditions existing upon your orator's line of railroad. The said Commission has denied to your orator the right to recognize the effect of competition on rates, and has failed to distinguish between through and local rates. All as will appear from the testimony taken before said Commission which is tendered to the court for inspection upon the filing of this bill of complaint.

In Consideration Whereof, and inasmuch as your orator is without adequate remedy at law in the premises and can have adequate relief only in a court of equity, to the end that the defendants may answer the several matters hereinbefore set forth, and that this Court may decree that the said order of the Railroad Commission of Ohio above referred to, relating to the rate on lake-cargo coal, made February 28th, 1910, is null and void and of no effect as respects your orator.

Your Orator Prays that the Railroad Commission of Ohio and the Pittsburg Vein Operators' Association of Ohio and their respective officers, agents, attorneys, representatives and members, and the other defendants named in the bill of complaint, be perpetually enjoined, restrained and prohibited from instituting or authorizing or directing any suit, action or actions, of either a civil or criminal nature, or any proceedings, against your orator, the object or purpose of which or relief sought by said action being to put into effect
or to enforce any of the provisions of said order of the Rail-
29 road Commission of Ohio respecting the rate on lake-cargo coal, or to subject your orator to any penalties or forfeitures for failure to comply with said order under the statutes of Ohio, made and provided, and from in any manner interfering directly or indirectly, with the continuation of the present rate on lake-cargo coal from the No. 8 mines f. o. b. vessel Cleveland and Huron as

in effect on your orator's railroad at the present time, or such other rate or rates as your orator may from time to time put into effect; and that, upon final hearing said order of the Railroad Commission of Ohio may be by decree of this Court adjudged to be null and void.

And your orator prays that, in the meantime and during the pendency of this suit, the said order of the Railroad Commission of Ohio may be suspended and that the said Railroad Commission of Ohio and the Pittsburg Vein Operators' Association of Ohio, their respective officers, agents, attorneys, representatives, employés and members, and the other defendants named in this bill of complaint, and each and all of them be temporarily enjoined and restrained as herein prayed for.

And your orator prays for such other relief as the nature of the case may require and to which your orator may be entitled.

May it please your Honors to grant unto your orator a writ of subpœna, to be issued out of and under the seal of this honorable Court directed to the defendants, commanding said defendants and each of them to be and appear in this Court on a day certain, to be therein named, and to answer the premises, but not under oath, answer under oath being hereby waived, and to abide by and perform such decree as may be rendered herein.

And your orator will ever pray, etc.

B. A. WORTHINGTON,
Receiver of W. & L. E. R. R. Company, Complainant.

SQUIRE, SANDERS & DEMPSEY,
Solicitors for Complainant.

W. M. DUNCAN,
Of Counsel.

STATE OF OHIO,
Cuyahoga County, ss:

B. A. Worthington, being first duly sworn, says that he as receiver of The Wheeling & Lake Erie Railroad Company, is the complainant in the above-entitled cause; that he has read the foregoing bill of complaint and knows the contents thereof that all the matters and things therein set forth are true except such as are stated to be upon information and belief, and, as to all such, he believes them to be true.

B. A. WORTHINGTON.

Sworn to and subscribed before me this 28th day of March, A. D. 1910.

[SEAL.] CHARLES C. OWENS,
Notary Public.

Exhibit I.

Railroad Commission of Ohio.

No. 70.

The Pittsburg Vein Operators' Association of Ohio, Complainant,

vs.

The Wheeling & Lake Erie Railroad Company and B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Defendants.

Amended Complaint.

(Filed May 19, 1909.)

Complainant says:

I. That it is a voluntary association of operators in the No. 8 or Pittsburgh vein of coal in the State of Ohio, the members of which own, control and operate sixty-five (65) coal mines in said vein of coal in the State of Ohio, and produce and sell approximately nine million (9,000,000) tons of coal per year; that among the objects of said association is the protection of the rights of the members thereof and the promotion of their general welfare; and that the place of business of said association is at the Schworm Building in the City of Massillon, Ohio.

II. That the defendant railroad company is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and that the defendant B. A. Worthington, receiver of said company, is duly appointed, qualified and acting as such receiver by virtue of an appointment made by the United States Circuit Court for the Northern District of Ohio, Eastern Division, in the case of The National Car Wheel Company vs. The Wheeling & Lake Erie Railroad Company, consolidated with The Central Trust Company of New York, Trustee, vs. The Wheeling & Lake Erie Railroad Company, being cause No. 7359 in equity, consolidated with No. 7603.

III. That the said railroad company is the owner of a line of railroad located exclusively in the State of Ohio and prior to the appointment of said receiver operated said railroad and was a common carrier engaged in the transportation of persons and property by railroad between Martins Ferry, in the southern part of the
31 State of Ohio, and points on Lake Erie in the northern part of the State of Ohio, to-wit, among others, the city of Cleveland and the village of Huron in said state; that the defendant B. A. Worthington, receiver, has, ever since his appointment, and is now in possession and control of said property, and, as such receiver, is a common carrier and in the operation thereof is engaged in the transportation of persons and property over the lines of said

railroad within the State of Ohio; that there are approximately sixteen (16) coal mines owned and operated by the constituent members of your complainant and located on and served by said railroad and said receiver in Jefferson and Harrison counties, Ohio, from which mines coal is loaded and transported over the line of said railroad to various points in the State of Ohio; that approximately six thousand (6,000) tons are transported each year over said railroad to the city of Cleveland, and approximately four hundred and fifty thousand (450,000) tons each year over said railroad to the village of Huron, for shipment by vessel therefrom to various ports on the Great Lakes.

That the average distance from said mines, by said railroad, to said city of Cleveland is approximately one hundred and thirty-four miles (134) and to said village of Huron is approximately one hundred and fifty-five (155) miles; that the defendant receiver demands, charges and collects upon the coal so transported over said railroad from said mines to said city of Cleveland and said village of Huron, for shipment by vessel as aforesaid, eighty-five cents (85c) per ton in carload lots, F. O. B. Cleveland, and an additional charge of five cents (5c) per ton for transferring said coal from the railroad cars to lake vessels; that said rate so demanded, charged and collected by said receiver is not a part of a through rate; that said coal is billed and consigned to the shipper or consignor at said points to-wit, Cleveland and Huron, and is by said receiver delivered at said points to the consignor or to his or its order and the said charges are paid to the defendant receiver by said consigner or shipper; that there is no common control, management or arrangement between the defendants and said vessels for a continuous carriage or shipment beyond said city of Cleveland and said village of Huron; that at the time said cars of coal are shipped from said mines to said points for shipment by vessel, the ultimate destination of said cars of coal is unknown to the consignor or shipper; that on the arrival of said cars of coal at said points of Cleveland and Huron, a portion of the same are appropriated by said consignor or shipper to the fulfill-
32 ment of the orders of his or its customers, as and when the same are needed for such purposes, and when so needed the same are delivered to said customers F. O. B. lake vessels at said points of Cleveland and Huron, that another portion of said cars of coal are put aboard lake vessels by said consignor or shipper and under a new and independent contract of carriage by the terms of which said lake vessels are to convey said coal from said consignor or shipper to various points on the Great Lakes; that another portion of said cars of coal are diverted at said points of Cleveland and Huron and there appropriated to other and local uses and purposes; that at the time said cars of coal are shipped from said mines to said points of Cleveland and Huron, it is not known by said consignor or shipper or by any other person or persons, or corporation, to which of the three general uses or purposes aforesaid said cars of coal will be appropriated.

IV. That the actual cost of said railroad and said receiver of transporting said coal in said carload lots from said mines of said

city of Cleveland and said village of Huron and there transferring the same to said vessels does not exceed the sum of thirty-five cents (35c) per ton; that a charge of fifty cents (50c) per ton by said railroad and said receiver for transporting and transferring said coal as aforesaid would produce for said railroad and said receiver a fair return or profit over and above the cost of the services rendered in transporting and transferring said coal as aforesaid; that said rate of eighty-five cents (85c) per ton for transporting said coal and five cents (5c) per ton for transferring said coal, so demanded, charged and collected by said defendant is therefore excessive, unjust and unreasonable per se and is excessive, unjust and unreasonable by comparison with rates demanded, charged and collected by this and other railroads under similar conditions.

Wherefore complainant prays that the defendants be required to answer the charges herein and that, after due hearing and investigation, an order be made commanding the defendants to cease and desist from said violation of the laws of Ohio herein complained of, and from demanding, charging and collecting said unjust and unreasonable rate; that it be determined and ordered herein what reasonable rate shall be charged by defendants in lieu of said unjust and unreasonable rate and that the Commission may make such further order as it may deem necessary in the premises.

33 THE PITTSBURG VEIN OPERATORS' ASSOCIATION OF OHIO,
By F. M. OSBORNE, *President.*

And by:

EDWARD JOHNSON,
C. E. MAURER,
F. M. OSBORNE,
Committee.

Dated at the City of Cleveland, Ohio, this nineteenth day of May, 1909.

H. B. ARNOLD,
8 East Long Street, Columbus, Ohio;
T. H. HOGSETT,
American Trust Bldg., Cleveland, Ohio,
Counsel for Complainant.

The addresses of the defendants are as follows:

The Wheeling & Lake Erie Railroad Company, Perry-Payne Building, Cleveland, Ohio.

B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Perry-Payne Building, Cleveland, Ohio.

EXHIBIT 2.

Railroad Commission of Ohio.

No. 70.

THE PITTSBURG VEIN OPERATORS' ASSOCIATION OF OHIO, Complainant,
vs.
THE WHEELING & LAKE ERIE RAILROAD COMPANY and B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Defendants.

Amended Answer to Amended Complaint.

Now comes The Wheeling & Lake Erie Railroad Company by B. A. Worthington, its Receiver, and B. A. Worthington as Receiver of the Wheeling & Lake Erie Railroad Company, and, for amended answer to the amended complaint filed in the above entitled cause, say:

1. The defendants admit that the complainant is a voluntary association of operators in the No. 8 or Pittsburg Vein of coal in the State of Ohio; the members of which control and operate coal mines in said vein of coal; that the place of business of said Association is in the City of Massillon, Ohio, but, for want of information, deny all the other allegations contained in Article I of said complaint.

2. The defendants admit the allegations contained in Article II of said complaint.

34 3. The defendants admit that The Wheeling & Lake Erie Railroad Company is the owner of a line of railroad located exclusively in the State of Ohio; that the said B. A. Worthington, as Receiver, is now in possession and control of said property; and that said railroad company engaged, through its said Receiver in the transportation of persons and property over its said line of railroad within the State of Ohio; that there are approximately * * * coal mines located on and served by said railroad, from which coal is loaded and transported over said line of railroad to the village of Huron for reshipment by vessel therefrom to various points beyond the State of Ohio; admit that the Receiver charges and collects upon the coal so transported over said line of railroad to the city of Cleveland and village of Huron, for reshipment by vessel to points on the Great Lakes beyond the State of Ohio ninety cents per ton in carload lots f. o. b. vessels Cleveland and Huron. Defendants deny each, all and singular the other allegations contained in Article III. of said complaint, and particularly deny that the rates charged as aforesaid are excessive, unjust and unreasonable, either in themselves or by comparison with rates demanded, charged and collected by either this railroad or other railroads under similar conditions.

4. The defendants deny each and all of the allegations set forth in Article IV. of said complaint.

THE WHEELING & LAKE ERIE RAILROAD COMPANY.
B. A. WORTHINGTON, *Receiver.*
B. A. WORTHINGTON,
As Receiver of The Wheeling & Lake Erie Railroad Company.

EXHIBIT 3.

Railroad Commission of Ohio.

No. 70.

THE PITTSBURG VEIN OPERATORS' ASSOCIATION OF OHIO, Complainant,
vs.
THE WHEELING & LAKE ERIE RAILROAD COMPANY and B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Defendants.

Complainant is an unincorporated association, composed of coal mine operators and coal mine operating companies, doing business as miners and shippers of coal, in what is known as the Number Eight District on the line of The Wheeling & Lake Erie Railroad Company. Complaint is filed against the Wheeling & Lake
35 Erie Railroad Company and against its Receiver B. A. Worthington. The mines operated by complainant companies are located on The Wheeling & Lake Erie Railroad and subsidiary lines operated by it, and their territory is designated in defendants' tariff as the Number Eight District. The complaint is that the rate of 90c per ton F. O. B. vessel charged by defendant for the transportation of coal in car loads from the mines in Number Eight District to the village of Huron, and to the city of Cleveland, Ohio, is excessive and unreasonable.

Much evidence was introduced on both sides, which, so far as the Commission can perceive, is not material. Likewise, counsel on both sides in support of the theories indicated by such testimony, devoted considerable time to the argument of matters, which, in the opinion of the Commission were not pertinent. Complainant urged that the cost of producing coal as compared with competing fields is a matter that should be given much weight by the Commission, while defendants just as strenuously contended that the Commission should consider, as controlling, the financial effect upon the road of a reduction of the rate against which complaint is made. Both theories are misleading. The reasonableness or unreasonableness of the rate charged by defendants is the sole question before the Commission. If one producer is at a disadvantage as compared with a competing producer, so far as cost of production is concerned,

that is his misfortune; and while such producer is entitled to sympathy, he is not thereby entitled to an advantage in rate. If it were admitted that a carrier had a right to equalize differing natural conditions by preferential rates, a wide field for discrimination would be without regulation. One of the necessities for rate regulation is the existence of the evil arising from the assumption by carriers of authority to neutralize natural advantages on one hand, and to create artificial advantages on the other, by manipulation of rates. An extreme illustration would be the application of the principle to farm products; if one producer's land will produce only 10 bushels of wheat per acre, while his neighbor's land will produce 30, it would hardly be the province of the carrier to attempt to equalize those differing conditions by adjusting transportation rates and making such rates more favorable to the farmer whose land has the lesser producing qualities. Further if the transportation rate be unreasonable in itself, its continuance cannot be justified upon the theory that its reduction would impair, to an extent, the prosperity of the carrier. What then is to be considered in
36 determining the question at issue? How is the reasonableness of a transportation rate to be ascertained? Complainants contend that the cost of carriage is the controlling element to be considered, while defendants deny that it is possible to ascertain the cost of carriage of a particular commodity, and contend that even if it were ascertainable, it is not an important element in rate making; that rates are not now, and never were, made by carriers on a cost basis. In fact, the evidence and argument of defendants in this case tend to the conclusion that there is no basis upon which the reasonableness of a particular rate can be determined except it be, possibly in a very uncertain and indefinite way, by comparison with other rates.

The Commission is of the opinion that cost of carriage is a fundamental element in rate making; and that rates should be adjusted so as to yield revenue sufficient to pay operating expenses and a reasonable return on the investment. The railway world has not yet produced the man who could ascertain this cost with mathematical accuracy; but the management of a railway property can determine at the end of each year whether or not the earnings as a whole have been sufficient to yield a safe margin of profit, a narrow margin or no margin.

In addition to the consideration of rates as a whole, it is necessary to give attention to the relation of rates on different commodities, as it would be unjust to exact the same rate for transportation of pig iron as for the transportation of millinery. It has been long recognized that there should be a classification of freight as a basis of rates; and while the theoretical principles of such classification are well recognized, in practice these principles are more or less ignored. The transportation of heavy, low priced commodities costs less per ton mile than the transportation of light, bulky, high-priced commodities.

As a carrier is an insurer of property committed to its care, value must also be considered as an element in the insurance phase of

transportation; hence, everything else being equal the real value of the commodity transported justifies a higher or lower rate, as the case may be, according to the insurance hazard involved. It would be unjust and inequitable for a carrier to impose a higher charge on a heavy, cheap commodity than it imposes on a lighter, more bulky and more valuable commodity. If competitive conditions are such as to make it necessary for a carrier to transport a particular commodity at a rate lower than it would in the absence of competition, the carrier is not thereby justified in exacting rates higher than would be just, on property transported where
37 competition is absent, so as to make the revenue as a whole, adequately profitable. Such commodity should bear only its just proportion of the aggregate charge. To establish that the cost of transporting a large volume of a particular commodity when the movement is fairly regular, is approximately ascertainable, Mr. C. W. Hillman, an expert accountant, who had made an exhaustive investigation as to the cost of carrying coal by defendant's line from Number Eight District to Huron was called as a witness. Defendant had previously given Mr. Hillman access to its books and records, and from the facts there ascertained, in connection with the analysis of the evidence introduced in the case, Mr. Hillman made his estimate and gave in detail different factors considered by him in making allocations and final estimate of cost of carriage.

Mr. Hillman's testimony covered the whole field of operation, and his method of allocation of costs of operation between passenger and freight traffic appears practicable and reasonable and his conclusions very logical. From the analysis of Mr. Hillman's testimony and according to his conclusions, it costs 39.585 cents per ton, carload lots, to transport coal from Number Eight District to Huron. This estimate is corroborated by rates on defendant's road made for the transportation of coal and similar commodities under like conditions, and by comparison with rates on other roads, as well as by testimony and estimates of other witnesses.

Defendant's line is divided into operating divisions, the coal in question moving over division designated as "One" and "Two." In apportioning expenses between freight and passenger transportation, Mr. Hillman used various accounts, but the average of the whole was 83.4 per cent chargeable to freight. The fact that for the year ending June 30, 1909, the revenue derived from freight transportation was 88.7 per cent of the whole, Mr. Hillman's allotment seems somewhat low; but this — doubtless neutralized by the allotment to Divisions One and Two, which was 87 per cent of the expenses chargeable to freight, and his allotment of 51.37 per cent of this, to coal transportation, in view of the fact, that for the year ending June 30, 1909, bituminous coal tonnage was 46.74 per cent of the tonnage transported by The Wheeling & Lake Erie. Adding to Mr. Hillman's estimate of 39.585 cents per ton, the expense of transportation to Huron yards, 30 per cent for margin of profit, gives 51.46 cents per ton, to which add five cents for loading charge, gives 56.46

cents per ton as representing the rate to be charged on Num-
38 ber Eight coal, if a 70 per cent operating ratio is considered fair, and if all other traffic bears a relatively equal burden of transportation expense. But if we go further, and add 40 per cent instead of 30 per cent we have a total of 60.419 cents per ton, as a liberal charge from mines in Number Eight District to boats at Huron.

Another method may be adopted in arriving at a determination of what is a reasonable rate for this service; the testimony shows that the Pennsylvania Company receives 32.6 cents per ton for transportation of coal in carload lots received from the Norfolk & Western Railway at Columbus, from Columbus to Sandusky. The distance is 110 miles, and it is fair to assume that this rate is compensatory, if not profitable. Deducting five cents for loading charge at Sandusky, we have 27.6 cents as representing the transportation charge, which is $2\frac{1}{2}$ mills per ton per mile, and amounts to 38.75 cents per ton for 155 miles, the distance via The Wheeling & Lake Erie from Number Eight District to Huron. Adding five cents for initial terminal expense, we have 43.75 cents per ton, to which add 30 per cent for margin of profit, we have 56.875 cents per ton, as representing a fair rate to be charged on coal in carloads from Number Eight mines to Huron; add to this five cents per ton for loading into boats, making a total of 61.875 cents per ton from mines to boat. If, to be absolutely beyond question, we make our calculation to a 60 per cent operating ratio basis, our finding would be 66.25 cents as representing a liberally compensatory rate to be charged on coal in carloads to Huron f. o. b. vessel; that is to say, coal transported on this basis would be paying its full share of transportation expense based on a 60 per cent operating ratio.

We have no right to assume that a carrier will transport freight at non-compensatory rates; consequently, it is fair to assume that the 32.6 cents per ton rate, received by the Pennsylvania as compensation for hauling coal in carloads from Columbus to Sandusky, yields at least a margin of profit.

It is quite true that a carrier is justified in establishing rate proportions on a less per ton mile basis than it establishes on local rates; but what is the warrant therefor? The real justification for the decreased cost of such transportation arises from the elimination of terminal expense. The Pennsylvania receives the coal in question from the Norfolk & Western Railway at Columbus, usually in train-load lots, therefore the initial expense of the Pennsylvania is less than it would be if it had to collect this coal from the mines
and consolidate and classify into trains; to that
39 extent, and no more, is the Pennsylvania justified in charging a proportional rate less than a local rate, where initial expense is involved. The 85 cent rate on coal in carloads from Number Eight District to Huron, an average distance of 155 miles, yields an average revenue of 5.48 mills per ton mile. The evidence disclosed that the average coal train tonnage was between fifteen and sixteen hundred tons net. Using a conservative estimate of 1,400 tons per train, the average train mile revenue on coal from Number Eight

District to Huron would be $7.67. The annual report of The Wheeling & Lake Erie Railroad for the year ending June 30, 1909, shows that the average freight train mile earnings of that road for the year was $3.18, to which add 40 per cent to cover movement of empty equipment, and we have an average train mile revenue for loaded trains of $4.45. This includes all classes of freight, high as well as low, long and short haul.

It is a long established practice and policy of carriers that low class freight be taxed proportionately less than the high class; that long hauls should pay less per ton mile and train mile, than short hauls; hence it follows that the average train mile revenue should be greater than the train mile revenue derived from the transportation of low class, long haul freight; yet here we have the anomaly of a long haul on freight of the lowest class, yielding more than the average on all commodities. Manifestly either the Number Eight coal is charged more than its fair proportion, or The Wheeling & Lake Erie Railroad is carrying a large amount of other freight at much less than a fair charge. But if all the freight carried by The Wheeling & Lake Erie Railroad has been charged on the same train mile basis, as Number Eight coal, the freight receipts for that year would have been $8,167,517.34. Assuming that revenues from other sources to have been unchanged, the total revenues would have been $8,940,495.22 and the operating ratio would have been only 47 per cent. No carrier is entitled to have a margin above expenses of 53 per cent. But even in such case, a rate producing a train mile revenue on Number Eight coal equal to the average train mile revenue *on Number Eight coal equal to the average train mile revenue would* be inequitable because the haul from Number Eight District to Huron and Cleveland, is much in excess of the average haul, and coal is entitled to the lowest basis of freight transportation rates. Thus it follows that coal transported in carloads from Number Eight District to Huron should be taxed at its fair proportion of operating expenses, less than the average per train mile rather than more.

40 The same reasoning applies to ton mile revenue. The Number Eight District-Huron rate, exclusive of vessel loading charge, yields 5.48 mills per ton mile. The average ton mile revenue of The Wheeling & Lake Erie Railroad for the year ending June 30, 1909, was 5.4 mills; this average, of course, includes all freight. It is well understood that small lot freight should pay very much more per ton mile than carload freight, because of the much greater economy of handling carload freight. Eighty thousand pounds of freight made up of four hundred shipments, of two hundred pounds each, will cost the carrier five times as much to handle as the same amount in one carload shipment. Again, freight hauled 25 miles will cost the carrier much more per ton mile, than that hauled 150 miles. So it seems inequitable that low class, long haul freight should yield a greater revenue per ton mile than the average of all freight. The fact that it does on The Wheeling & Lake Erie Railroad shows conclusively that something is wrong. Possibly the average per ton mile revenue is too low; and as a consequence the

total revenue derived from freight transportation is not adequate; but the fact that the total revenue does not bear the correct relation to the total cost, is no justification for the imposition on a particular movement or a particular commodity, more than its equal proportion, in the attempt to make up the deficit.

It was claimed by complainants that a reduction in the rate on coal from Number Eight District to the docks at Huron would naturally increase the tonnage. Defendants disputed this claim solely on the theory that a reduction in the Number Eight-Huron rate would be followed by a reduction in the West Virginia Lake Port rate, so as to prevent an increase in shipments from the Number Eight Field. Assuming, however, for the time, that the West Virginia Lake Port rates would not be reduced, it seems to follow that the Ohio mines would increase their output of cargo coal. The Wheeling & Lake Erie Railroad would benefit from this increase because the coal tonnage now handled over the Huron dock is much less than the capacity of the dock, and an increase would reduce the ton cost of dock handling.

The defendant maintains that it is not in position to take care of an increase in the coal traffic, because the volume of coal traffic now is nearly up to the capacity of The Wheeling & Lake Erie Railroad. This is really no answer at all, because a carrier is bound to provide facilities sufficient to meet the demand. If it were admitted that a common carrier could arbitrarily limit the extent of its
41 business, it would be admitting its power to prevent the development of the territory. It would further justify any rate a carrier might see fit to impose with a view of limiting the offerings of freight for transportation. In other words, a community of interests could, by the application in practice of this theory, injure incalculably a particular territory, while unduly stimulating a competing territory.

But beyond all this, The Wheeling & Lake Erie Railroad can take care of an increased tonnage from the Number Eight field to the Lake Ports without materially increasing its total tonnage, by simply advancing the unduly low rates and proportions which it has in effect, and which at present operate to reduce the average ton mile revenue. In fact, the increased lake coal traffic at a reduced rate, substituted for the very low rate freight now transported, will probably make the aggregate freight traffic revenue larger than at present, without greatly increasing the total tonnage.

We have found, by different methods of calculation amounts as representing the fair rates to be charged on coal in carloads from the Number Eight District to Huron Dock f. o. b. vessels, viz: 57, 61, 62 and 66 cents. To be absolutely certain that a sufficient sum has been allowed, giving the advantage of every doubt to the railroad company we are of the opinion that 70 cents per ton f. o. b. vessel would be ample to both the village of Huron and the city of Cleveland.

We therefore, find that the existing rate of 90 cents per ton imposed by The Wheeling & Lake Erie Railroad for the transportation of coal in carloads from Number Eight District to the village

of Huron and to the City of Cleveland f. o. b. vessel, is unjust and unreasonable and therefore unlawful.

An order will be issued accordingly.

(Endorsement:) 7691. Filed Mar. 28, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Subpœna.)

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to summon Railroad Commission of Ohio; Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, its President and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., citizens of and resident in the State of Ohio,
42 if they be found in your District, to be and appear in the Circuit Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland on the first Monday in June next, to answer a certain Bill in Chancery, filed and exhibited in said Court against them by B. A. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company, a citizen of and resident in the State of Ohio.

Hereof you are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 28th day of March, A. D. 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER, *Clerk*,
By A. H. ELLIOTT,
Deputy Clerk.

Memorandum.

The said defendants are required to enter their appearance in this suit in the Clerk's Office of said Court on or before the first Monday of May, 1910, otherwise the said bill may be taken pro confesso.

B. C. MILLER, *Clerk.*

(Endorsement on Subpœna when issued:) 7961. United States Circuit Court, Northern District of Ohio. B. A. Worthington, Receiver, etc., vs. Railroad Commission of Ohio, et al. Appearance Day First Monday in May, 1910. Answer Day First Monday in June, 1910. Squire, Sanders & Dempsey, Complainant's Attorneys. $50.00 deposited for costs for which the plaintiff may be liable in this suit. B. C. Miller, Clerk.

(Endorsement on Subpœna When Returned.)

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

U. S. Marshal's Return.

Received this writ at Cleveland, O., March 28, 1910, and on March 31, 1910, at the same place I served it on the within named, C. E. Maurer by delivering to him, personally, a true and certified copy hereof, with all endorsements thereon and at the same time I left with him a true and certified copy of the order to show cause, and Bill of Complaint, with all endorsements thereon; and on the within named, Wm. P. Murray by delivering to him personally, a true and certified copy hereof, with all endorsements thereon, and at the same time I left with him a true and certified copy of the Order to show cause, and Bill of Complaint, with all endorsements thereon; and on Frank M. Osborne by leaving at his usual place of residence with his daughter, Dorothy Osborne, an adult member of the family, a true and certified copy hereof, with
43 all the endorsements thereon, and at the same time I left with her a true and certified copy of the Order to show cause and Bill of Complaint, with all endorsements thereon; and on J. J. Roby by leaving at his usual place of residence with his wife, Della M. Roby a true and certified copy hereof, with all endorsements thereon, and at the same time I left with her a true and certified copy of the Order to show cause and Bill of Complaint, with all endorsements thereon.

HYMAN D. DAVIS,
U. S. Marshal.
By HARRY T. BROCKMAN,
Deputy.

Marshal's Fees.

Service	8.00
Travel	.72
Service	8.00
Travel	.72
Service	8.00
	$25.44

Returned and Filed April 4, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Order of Service on Absent Defendants.)

February Term, A. D. 1910, to wit, March 28, 1910.

Present: Honorable Robert W. Tayler, U. S. District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver, etc.,
vs.
RAILROAD COMMISSION OF OHIO ET AL.

Upon application of the complainant herein for an order respecting service upon defendants not found in this district, it is hereby ordered that the Railroad Commission of Ohio, Howard M. Mannington, Secretary of the Pittsburg Vein Operators' Association of Ohio and Edward Johnson be and are hereby ordered and directed to appear, plead, answer or demur to the bill of complaint filed in the above entitled cause by June 6th, 1910.

(Order to Show Cause.)

February Term, A. D. 1910, to wit, March 28th, 1910.

Present: Honorable Robert W. Tayler, U. S. District Judge.

44 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
vs.
RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS' Association of Ohio, Frank M. Osborne, its President, and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al.

This day, to-wit: the 28th day of March, 1910, this cause came on to be heard upon the verified bill of complaint of the complainant and upon the motion for temporary injunction as prayed for in the bill, and it is ordered that the defendants, and each of them, be required to appear before this court on the second day of April, 1910, at 9:30 a. m. or as soon thereafter as counsel can be heard and show cause why the said motion made should not be granted and a temporary restraining order issued.

(Certified Copy of Order for Service with Return.)

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss:

At a stated term of the Circuit Court of the United States, within and for the Eastern Division or the Northern District of Ohio, begun and held at the City of Cleveland, in said District, on the first Tuesday in February, being the first day of said month, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and thirty-fourth, to-wit: on Monday, the 28th day of March, A. D. 1910.

Present: Honorable Robert W. Tayler, United States District Judge.

Among the proceedings then and there held were the following, to wit:

7961. In Equity.

B. A. WORTHINGTON, Receiver, etc.,
vs.
RAILROAD COMMISSION OF OHIO ET AL.

Upon application of the complainant herein for an order respecting service upon defendants not found in this district, it is hereby ordered that the railroad Commission of Ohio, Howard M. Mannington, Secretary of the Pittsburgh Vein Operators' Association of Ohio and Edward Johnson, be and are hereby ordered and
45 directed to appear, plead, answer or demur to the bill of complaint filed in the above entitled cause by June 6th, 1910.

(TAYLER, *Judge.*)

THE UNITED STATES OF AMERICA, *ss:*

I, B. C. Miller, Clerk of the Circuit Court of the United States within and for the Northern District of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original order for service, entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is true, full and complete transcript and copy thereof.

Witness my official signature and the seal of said Court, at Cleveland in said District, this 28th day of March A. D. 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER, *Clerk.*

(Endorsement when Issued:) No. 7961. United States Circuit Court Northern District of Ohio, Eastern Division. B. A. Worthington, Receiver, etc., vs. Railroad Commission of Ohio, et al. Certified copy of Order for Service.

(Endorsement When Returned.)

U. S. Marshal's Return.

Received this writ at Cincinnati, Ohio, on March 29th, 1910, and on the same day I served the within named Railroad Commission of Ohio by handing a true copy of this writ, with the endorsement thereon, to Oliver P. Gothlin, a member of said Commission, personally, at Columbus, Ohio. And at the same time and in the same manner I served the said Railroad Commission of Ohio with a copy of Bill of Complaint in this cause.

And on March 30th, 1910, I served the within named Howard Mannington, Secretary of the *of the* Pittsburg Vein Operator's Association of Ohio, by handing to him personally a true copy of this writ, with the endorsement thereon, at Columbus, Ohio, and at the same time and in the same manner I served the within named Howard D. Mannington, Secretary as aforesaid, with a copy of Bill of Complaint in this cause.

And on March 30, 1910, I served the within named Edward Johnson by handing to him personally a true copy of this writ, with the endorsement thereon, at Columbus, Ohio. And at the same time, and in the same manner I served the said Edward Johnson with a copy of Bill of Complaint in this Cause.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
46 By ALBERT BAUER, *Deputy.*

Fees.

Mileage	$.36
3 services, Order	6.00
3 services, Bill of Comp't	6.00
	$12.36

Returned and Filed Apr. 1, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Certified Copy of Order to Show Cause and Return.)

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss:

At a Stated Term of the Circuit Court of the United States, Within and for the Eastern Division of the Northern District of Ohio, Begun and Held at the City of Cleveland, in said District, on the First Tuesday in February, Being the First Day of said Month, in the Year of Our Lord One Thousand Nine Hundred and Ten, and of the Independence of the United States of America, the One Hundred and Thirty-fourth, to wit: on Monday, the 28th Day of March, A. D. 1910.

Present: Honorable Robert W. Tayler, United States District Judge.

Among the Proceedings then and there had were the following, to-wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS' Association of Ohio, Frank M. Osborne, Its President, and Howard M. Mannington, Its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

This day, to-wit: the 28th day of March, 1910, this cause came on to be heard upon the verified bill of complaint of the complainant and upon the motion for temporary injunction as prayed for in the bill, and it is ordered that the defendants, and each of them be required to appear before this court on the second day of April, 1910, at 9:30 o'clock a. m. or as soon thereafter as counsel can be
47 heard and show cause why the said motion made should not be granted and a temporary restraining order issued.

(TAYLER, *J.*)

THE UNITED STATES OF AMERICA, *ss:*

I, B. C. Miller, Clerk of the Circuit Court of the United States, within and for the Northern District of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original order to show cause entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term and on the

day therein named; and do further certify that the same is a full, true, and complete transcript and copy thereof.

Witness my official signature and the seal of said Court at Cleveland in said District this 28th day of March, A. D., 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER, *Clerk.*

(Endorsement when issued:) No. 7961. United States Circuit Court, Northern District of Ohio, Eastern Division. B. A. Worthington, Receiver etc. vs. Railroad Commission of Ohio, et al. Certified copy of Order to Show Cause.

(Endorsement When Returned.)

U. S. Marshal's Return.

Received this writ at Cincinnati, Ohio, on March 29th, 1910, and on March, 29th, I served the within named Railroad Commission of Ohio by handing a true copy of this writ, with the endorsement thereon, to Oliver P. Gothlin, a member of said Commission, at Columbus, Ohio.

And on March 30, 1910, I served the within named Pittsburg Vein Operators' Association of Ohio, by handing a true copy of this writ, with the endorsement thereon, to Howard D. Mannington, Secretary of said Association; no chief officer or higher representative of said Association found in this district upon whom to effect service.

And on March 30, 1910, I served the within named Edward Johnson by handing to him personally a true copy of this writ, with the endorsement thereon, at Columbus, Ohio.

The other within named defendants not found in this district.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By ALBERT BAUER, *Deputy.*

48 *Fees.*

3 services	$6.00
3 miles	.36
	$6.36

Returned and Filed April 1, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Hearing on Motion for Preliminary Injunction.)

February Term, A. D., 1910, to-wit, April 2nd, 1910.

Present: Honorable Robert W. Tayler, United States District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver,
vs.
RAILROAD COMMISSION OF OHIO et al.

This day this cause came on to be heard on the application of complainant for temporary restraining order and the pleas of defendant to jurisdiction, and was argued by counsel submitted to the Court and taken under advisement by the court.

(Plea to Jurisdiction.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant
vs.
RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS' Association of Ohio, Frank M. Osborne, Its President, and Howard M. Mannington, Its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

Plea of Edward Johnson to the Jurisdiction of the Court.

Edward Johnson, one of the defendants in the above cause, specially appearing under protest, for the purpose of denying the jurisdiction of this court over his person, and for no other purpose, for this his special plea says: that it is not true that said Frank M. Osborne, the Pittsburg Vein Operators' Association of Ohio, or its officers or members, or Howard M. Mannington, or C. E. Maurer, or Edward Johnson, or J. J. Roby, or W. P. Murray, or any or all of them, have attempted to enforce against B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, a
49 certain order of the Railroad Commission of Ohio, prescribing a rate on lake cargo coal, or to institute any civil action to recover three-fold damages by reason of the failure of said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, to comply with said order, all as alleged in said complaint. This defendant, Edward Johnson, avers that all the preceding

matters alleged herein are true and pleads the same for the purpose of showing that this Court is without jurisdiction over him.

Wherefore insisting upon his exemption from suit in this court he says; that he is a resident and inhabitant of the City of Columbus, in the Eastern Division of the Southern Judicial District of Ohio, and that this Honorable Court is without jurisdiction in the premises.

T. H. HOGSETT,
Attorney for Edward Johnson.

STATE OF OHIO,
Cuyahoga County, ss:

T. H. Hogsett, being first duly sworn deposes on oath and says; that he is the attorney for Edward Johnson, defendant in the above cause; that said Edward Johnson is a non-resident of and is absent from the Northern District of Ohio, Eastern Division; that he has read the foregoing plea; that the same is true in point of fact and is not interposed for delay.

T. H. HOGSETT.

Sworn to before me by the said T. H. Hogsett and subscribed in my presence this 2nd day of April, A. D., 1910.

[SEAL.] W. D. TURNER,
Notary Public.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

T. H. HOGSETT,
Solicitor for Edward Johnson.

(Endorsement:) No. 7961. In Equity. B. A. Worthington, Receiver etc. Complainant, vs. Railroad Commission of Ohio, et al., Defendant. In the Circuit Court of the U. S. for the Northern District of Ohio, Eastern Division. Plea of Edward Johnson to the Jurisdiction of the Court filed Apr. 2, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(*Plea to Jurisdiction.*)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

50 No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS Association of Ohio, Frank M. Osborne, Its President, and Howard M. Mannington, Its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

Plea of Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, Its President; C. E. Maurer, J. J. Roby, and W. P. Murray.

Come now the Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, its President, C. E. Maurer, J. J. Roby and W. P. Murray, defendants in the above entitled suit, and joining themselves together for the purpose of this plea, and for no other purposes whatever, by protestation, not confessing or acknowledging all or any parts of the matters or things in the said Bill of Complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto and for plea say, that it is not true that said Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, its President, or its officers or members, or Howard M. Mannington, or C. E. Maurer, or Edward Johnson, or J. J. Roby, or W. P. Murray, or any or all of them, have attempted to enforce against B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, a certain order of the Railroad Commission of Ohio, prescribing a rate of lake cargo coal, or to institute any civil action to recover three-fold damages by reason of the failure of said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, to comply with said order, all as alleged in said complaint.

These pleading defendants aver that all of the preceding matters alleged herein are true, and plead the same to the said Bill of Complaint, and humbly pray the judgment of this Honorable Court whether they, or any of them, ought to be compelled to make any further or other answer to the said Bill of Complaint, and further pray to be hence dismissed with their costs and charges in that behalf most wrongfully sustained.

T. H. HOGSETT,

Solicitor for Defendants Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, Its President; C. E. Maurer, J. J. Roby, and W. P. Murray.

51

STATE OF OHIO,
Cuyahoga County, ss:

Frank M. Osborne, being first duly sworn, deposes and says that he is one of the defendants making the above plea; that he has read the foregoing plea to the Bill of Complaint; that the same is true in point of fact and is not interposed for purposes of delay.

F. M. OSBORNE.

Sworn to before me by the said Frank M. Osborne, and by him subscribed in my presence, this 2nd day of April, A. D., 1910.

[SEAL.] W. D. TURNER,
Notary Public.

I certify that in my opinion the foregoing plea is well founded in point of law.

T. H. HOGSETT,
Counsel for Defendants Pittsburg Vein Operators' Association of Ohio; Frank M. Osborne, Its President; C. E. Maurer, J. J. Roby, and W. P. Murray.

(Endorsement on Plea to Jurisdiction of Pittsburg Vein Operators' Association of Ohio:) No. 7961. In Equity. B. A. Worthington etc., Complainant, vs. Railroad Commission of Ohio, et al., Defendant. In the Circuit Court of the U. S. for the Northern District of Ohio, Eastern Division. Plea of Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, C. E. Maurer, J. J. Roby, W. P. Murray. Filed April 2, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Plea to Jurisdiction.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS' Association of Ohio, Frank M. Osborne, Its President, and Howard M. Mannington, Its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants

52 Plea of Howard D. Mannington to the Jurisdiction of the Court.

Howard D. Mannington, made a defendant in the above cause under the erroneous name of Howard M. Mannington, specially ap-

pearing under protest for the purpose of denying the jurisdiction of this court over his person, and for no other purpose, for this his special plea, says: that it is not true that said Frank M. Osborne, the Pittsburg Vein Operators' Association of Ohio, or its officers or members, or Howard M. Mannington, or C. E. Maurer, or Edward Johnson, or J. J. Roby, or W. P. Murray, or any or all of them, have attempted to enforce against B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, a certain order of the Railroad Commission of Ohio, prescribing a rate on lake cargo coal, or to institute any civil action to recover three-fold damages by reason of the failure of said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, to comply with said order, all as alleged in said complaint.

This defendant, Howard D. Mannington, further says that it is not true that he is the Secretary of the Pittsburag Vein Operators' Association, or that he is an officer of or in any way connected with said association.

This defendant, Howard D. Mannington, avers that all the preceding matters alleged herein are true and pleads the same for the purpose of showing that this Court is without jurisdiction over him

Wherefore insisting upon his exemption from suit in this court he says that he is a resident and inhabitant of the City of Columbus, in the Eastern Division of the Southern Judicial District of Ohio, and that this Honorable Court is without jurisdiction in the premises.

T. H. HOGSETT.
Attorney for Howard D. Mannington.

STATE OF OHIO,
Cuyahoga County, ss:

T. H. Hogsett, being first duly sworn deposes on oath and says; that he is the attorney for Howard D. Mannington, defendant in the above cause; that said Howard D. Mannington is a non-resident of and is absent from the Northern District of Ohio, Eastern Division; that he has read the foregoing plea; that the same is true in point of fact and is not interposed for delay.

T. H. HOGSETT.

Sworn to before me by the said T. H. Hogsett and by him subscribed in my presence this 2nd day of April, A. D., 1910.

[SEAL.] W. D. TURNER,
Notary Public.

53 I hereby certify that in my opinion the foregoing plea is well founded in point of law.

T. H. HOGSETT,
Solicitor for Howard D. Mannington.

(Endorsement on Plea of Howard D. Mannington:) No. 7961. In Equity. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Plaintiff, vs. Railroad Commission of Ohio, et al, Defendant. In the Circuit Court of the United States for the

Northern District of Ohio, Eastern Division. Plea of Howard D. Mannington to the Jurisdiction of the Court. M. B. & H. H. Johnson, Cleveland, Ohio.

(*Plea to Jurisdiction.*)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO; PITTSBURG VEIN OPERATORS' ASSOCIATION of Ohio; Frank M. Osborne, its President, and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

Plea of Railroad Commission of Ohio to the Jurisdiction of the Court.

The Railroad Commission of Ohio, one of the defendants in the above case, specially appearing under protest, for the purpose of denying the jurisdiction of this court over it, and for no other purpose, for this its special plea says: that it is not true that said Frank M. Osborne, the Pittsburg Vein Operators' Association of Ohio, or its officers or members, or Howard M. Mannington, or C. E. Maurer, or Edward Johnson, or J. J. Roby, or W. P. Murray, or any or all of them, have attempted to enforce against B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, a certain order of the Railroad Commission of Ohio, prescribing a rate on lake cargo coal, or to institute any civil action to recover three-fold damages by reason of the failure of said B. A. Worthington, Re-
54 ceiver of The Wheeling and Lake Erie Railroad Company, to comply with said order, all as alleged in said complaint.

This defendant, Railroad Commission of Ohio, avers that all the preceding matters alleged are true and pleads the same for the purpose of showing that this Court is without jurisdiction over it.

Wherefore insisting upon its exemption from suit in this court it says: that it is a resident and inhabitant of the City of Columbus, in the Eastern Division of the Southern Judicial District of Ohio, and that this Honorable Court is without jurisdiction in the premises.

U. G. DENMAN, *Att'y Gen'l.*
Attorney for Railroad Commission of Ohio.

T. H. HOGSETT,
FREEMAN T. EAGLESON.

STATE OF OHIO,
Cuyahoga County, ss:

—— ——, being first duly sworn deposes on oath and says; that he is the attorney for the Railroad Commission of Ohio, defendant in the above cause, that said Railroad Commission of Ohio is a non-resident of and is absent from the Northern District of Ohio, Eastern Division; that he has read the foregoing plea; that the same is true in point of fact and is not interposed for delay.

—— ——.

Sworn to before me by the said —— —— and by him subscribed in my presence this — day of April, A. D., 1910.

——,
Notary Public.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

U. G. DENMAN, *Att'y Gen'l.*
T. H. HOGSETT, AND
F. T. EAGLESON,
Attorneys for Railroad Commission of Ohio.

(Endorsement on Plea of Railroad Commission of Ohio to Jurisdiction:) No. 7961. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Plaintiff, vs. Railroad Commission of Ohio, et al., Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. Plea of Railroad Commission of Ohio, to the jurisdiction of the Court. Filed April 2, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O., M. B. & H. H. Johnson.

55 (*Order Dismissing Bill of Complaint as to All Defendants Except Railroad Commission of Ohio.*)

April Term, A. D. 1910, to wit, June 25th, 1910.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
vs.
RAILROAD COMMISSION OF OHIO et al.

Present: Honorable Robert W. Tayler, United States District Judge.

In this cause, by consent of parties, it is this day ordered by the Court that the bill of complaint be and the same is hereby dismissed without prejudice to complainant as to all the defendants named therein except Railroad Commission of Ohio.

(*Leave to File Answer.*)

April Term, A. D., 1910, to-wit; June 25th, 1910.

Present: Honorable Robert W. Tayler, United States District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
vs.
RAILROAD COMMISSION OF OHIO et al.

In this cause on application of defendant, Railroad Commission of Ohio, leave is granted it to file its answer herein instanter, and said answer is accordingly filed.

Answer.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO; PITTSBURG VEIN OPERATORS' ASSOCIATION of Ohio; Frank M. Osborne, its President, and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

Answer of the Above-named Defendant, The Railroad Commission of Ohio, to the Bill of Complaint of the Above-named Plaintiff, B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company.

56 For answer to said bill of Railroad Commission of Ohio, says:

1. That it admits that it is a body created and organized under and pursuant to the laws of the State of Ohio, with capacity to be sued under such name; that it acts pursuant to power and authority vested in it by the Legislature of the State of Ohio; that it is authorized to keep its office in the capital of the State of Ohio, to-wit: Columbus and to hold sessions at any other place in the State which convenience may require; that the Pittsburg Vein Operators' Association of Ohio is a voluntary association of persons and corporations owning, controlling or operating coal mines in the No. 8 Ohio coal district, situated in Jefferson, Harrison and Belmont Counties, Ohio,

and that the headquarters of said association is in the City of Massillon, Ohio; that complainant, B. A. Worthington, is the duly appointed qualified and acting Receiver of all the property, rights and franchises of The Wheeling & Lake Erie Railroad Company, as alleged in Part I of said bill of complaint; but that this defendant is not informed as to the truth of the other allegations set out in Part I of said bill of complaint, and for that reason denies that the same are true and asks that complainant be put to his proof.

2. That it admits that this is a civil action and that the amount in controversy exceeds, exclusive of interest and costs, the sum of Five Thousand Dollars ($5,000.00); admits that complainant, in the management of the Railroad of which he is Receiver, and in the charging and enforcing of said lake cargo coal rate, is under the direction and control of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, which said court appointed said complainant Receiver of said railroad; and admits that this defendant will attempt, pursuant to authority vested in it by virtue of the statutes of the State of Ohio, to enforce a certain order made by this defendant and set out in Part XX of said bill of complaint, which said order prescribed a rate for the transportation of said lake cargo coal from said mines in the Counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to the ports of Huron and Cleveland, both of which are in the State of Ohio; and this defendant denies all the allegations of Part II of said bill of complaint not hereinbefore admitted to be true.

3. That this defendant admits that the property, over which complainant was appointed Receiver, consists of a single track
57 Railroad extending from Toledo, Ohio, to Steubenville and Martins Ferry on the Ohio River, and from Adena to St. Clairsville, and from Huron, on Lake Erie, to Norwalk Junction; from Cleveland to Zanesville, from Canton to Sherrodsville, and various small branches extending therefrom, but says that as to the number of miles and the names of divisions thereof it is not informed.

4. That this defendant is not informed as to the amount of the capital stock, funded debt, equipment obligations, receivership certificates, or as to the correctness of any other fact or facts set out in Part IV of said bill of complaint, and for this reason denies that the same is true, and asks that said complainant be put to his proof with respect thereto.

5. That this defendant is not informed with respect to the matters alleged in Part V of said bill of complaint, and has not sufficient information on which to base a belief, and therefore denies that the same are true, and asks that complainant be put to his proof, though this defendant admits that said B. A. Worthington is and since the month of June, A. D., 1908, has been the duly appointed, qualified and acting Receiver of the property of said The Wheeling and Lake Erie Railroad Company.

6. That this defendant admits that three of the coal producing districts served by The Wheeling and Lake Erie Railroad are the so-called Massillon District, Middle District and No. 8 Ohio District,

and that the Pittsburg Vein Operators' Association is an organization whose constituent members are interested in mining operations in said No. 8 Ohio District admits that said complainant, as Receiver, has classified coal for tariff purposes as railway fuel coal, lake cargo coal and commercial coal; but says that it is not informed as to the other matters of fact alleged in Part VI of said bill of complaint, and therefore denies that the same are true, and asks that complainant be put to his proof.

7. That this defendant is not informed as to the matters set out in Part VII of said bill of complaint, and for this reason denies that the same are true, and asks that complainant be put to his proof.

8. That this defendant admits that at the time of the filing of said complaint before this defendant, the Railroad Commission of Ohio, by the Pittsburg Vein Operators' Association of Ohio, and since that time said complainant has had in effect a rate of Ninety Cents (90 cents) per ton f. o. b. vessel on so-called lake cargo coal; but that this defendant denies all and singular the other allegations made in Part VIII of said bill of complaint, in the manner
58 and form therein alleged, and says that the facts concerning and relating to the production, transportation and sale of said No. 8 lake coal are as follows:

That said number 8 lake coal is mined and produced by said No. 8 operators at the same time and in connection with said railroad fuel coal and said commercial coal, and that all three classes or kinds of said coals are loaded at said mines in cars furnished by said The Wheeling and Lake Erie Railroad Company; that when it has been determined by said shippers to assign any of the various cars of coal mined and loaded at said mines, for the purpose of lake shipment, said cars so selected and assigned are billed to Huron or Cleveland on the line of The Wheeling & Lake Erie Railroad Company to the order of said shippers or to the order of some person or persons employed by or acting for said shippers, the names of various persons frequently being used as the nominal consignee for the purpose of distinguishing between the different classes of coal contained in said cars; that on the arrival of said cars of coal at said points of Huron and Cleveland, said cars are placed in the yards of said The Wheeling and Lake Erie Railroad Company at those points to await the orders of said shippers; that when sufficient cars have accumulated in said yards with which to load a lake vessel, and when said lake vessel has been procured by said shippers, said shippers then direct said railroad company to take certain of said cars of coal from said yards and unload or transfer the contents of the same to said vessel, or the contents of so many of said cars as may be necessary to load said vessel to its capacity; that the contents of said cars of coal are transferred to said vessel by said railroad only as and when directed by said shippers.

That the arrangements for the carrying of said coal by said vessel are made by said shippers for and in their own behalf, or for and in behalf of the purchasers or prospective purchasers of said coal; that said arrangements are entirely independent of and disconnected from the contract or agreement made by said shippers with the

Wheeling and Lake Erie Railroad Company, and its Receiver, for the carriage of said coal from said mines to the lake front; and that said The Wheeling and Lake Erie Railroad Company, and its said Receiver, have nothing whatever to do with said arrangements between said shippers and said lake carrier, and do not even have knowledge of the terms of said arrangements or the name of the transportation company or of the vessel which is to convey said coal from said lake ports, until said The Wheeling and Lake Erie Railroad Company, or its Receiver, is notified by said shippers to
59 load a certain named vessel on a certain fixed date with cars of coal from a certain designated class of shipments, and that said contracts with said vessel-owners are made sometimes before and sometimes after said lake coal is shipped to said ports of Huron and Cleveland.

That the contracts for the sale of said No. 8 lake coal, and the sales of the said No. 8 lake coal, are made by said shippers in the following manner: (1) Contracts for the sale of large quantities of said coal, at a certain price per ton, are frequently made a long time before the coal to be supplied under said contract has been mined; that by the terms of some of said contracts the obligations of said shippers cease when said coal is delivered f. o. b. vessel at said lake ports of Huron and Cleveland, and that title to and risk in said coal after delivery on board said vessel are to be and are in said purchasers, and that said purchasers effect insurance on the cargo of coal so loaded to protect said purchasers during the lake voyage; that by the terms of other of said contracts of sale the obligations of said shippers are to deliver certain coals at a certain rate per ton, at various points on the Great Lakes other than said points of Huron and Cleveland. (2) Contracts for the sale of cargoes of said lake coal are frequently made and said cargo loaded from cars of coal standing at said ports of Huron and Cleveland when said contract of sale is made, though said sale or contract of sale was not even anticipated or contemplated at the time when said cars appropriated to said contract of sale were shipped from the mines, or when they arrived at Huron or Cleveland.

That said shippers frequently lend coal belonging to them and standing in said cars in said yards of said railroad company at Huron and Cleveland to each other, so as to enable the borrowing shipper to obtain sufficient coal with which to load a vessel when said borrowing shipper may happen to need the same.

That said shippers send large quantities of coal from their said mines to said ports of Huron and Cleveland to be used as fuel coal by said vessels carrying said lake cargo coal.

That of the coal started by said shippers from their said mines to the lake front at Huron and Cleveland, thousands of tons are annually diverted en route and appropriated to other uses.

That at the time when said cars of lake coal are started towards said lake ports of Huron and Cleveland by said shippers billed and consigned as aforesaid, it is not known to said shippers, or to said railroad or to said Receiver, or to any other person or corporation, which car or cars, if any, will be diverted to uses other
60 than lake cargo shipments, and that it is not known to whom

said car or cars, or train of said coal will be shipped after the same shall have reached the lake front, or on what vessel the same will be loaded for lake carriage, or whether the same shall be delivered to some purchaser, f. o. b. vessel or ultimately delivered to some purchaser at the upper lake ports.

That no specific appropriation of any of said coal is made to any particular purpose, or to any particular consignee until after the arrival of said coal at said ports of Huron and Cleveland, except in the cases in which said coal is diverted en route, but that the exclusive control of, and the general title to this undivided and unappropriated mass of property remains in said shippers, and that in no case is there an appropriation of any specific part of this mass of coal to the fulfillment of any of said contracts for the sale of said lake coal until said coal is finally deposited in said vessel in said ports of Huron and Cleveland.

That the movement of said coal from the mines of said shippers and the detention of the same in the yards at Huron and Cleveland, all of which is necessary to the proper and economic handling of said coal, and all of which is done without any intent or purpose to break up the continuity of any carriage of said coal, which would otherwise be a through carriage or shipment, is a part of a general preliminary step by the shippers which embraces the collection and assemblying of a large mass of their said coal at said ports of Huron and Cleveland preparatory to appropriating different parts thereof to the various uses aforesaid; that said appropriation of said lake cargo coal to said various purchasers pursuant to said contracts of sale, is first made when said coal is properly placed in the holds of said vessels, and that a new and independent carriage of said lake coal begins after the delivery of said coal in the holds of said vessels, at which time the shipment of any defined or specified mass of said coal to any consignee beyond the State of Ohio first begins.

That after said lake coal has been delivered by said railroad, or said Receiver, to said shippers or consignees on board said vessels, said shippers or consignees may, without the consent of said railroad, and without violating or varying any part of said contract of carriage between said shippers and said railroad, cause said cargoes of coal to be transported to any point on the Great Lakes in the State of Ohio or in any other State.

61 9. That this defendant admits that in properly unloading said lake cargo coal from cars and putting the same into the holds of vessels, it is necessary and customary for complainant to have said coal properly trimmed or distributed in the holds of said vessels; but that this defendant denies each and every allegation of fact in Part IX of said bill of complaint not herein admitted to be true.

10. That this defendant admits that there is in Western Pennsylvania a coal producing district known as the Pittsburg District; admits that a part of the coal produced in said Pittsburg District is shipped to the port of Huron Ohio, via Wabash, Pittsburg Terminal, West Side Belt, and Wheeling and Lake Erie Railroads; admits that the rate on so-called lake cargo coal from said Pittsburg District

to said lower lake ports, including Huron, is Three Cents (3 cents) per ton higher than the rate on lake cargo coal from said No. 8 Ohio District; admits that a large portion of the coal moving over the Wheeling and Lake Erie Railroad of which complainant is Receiver, is not included in said lake cargo trade and moves to points outside of the State of Ohio; but this defendant denies the other averments contained in Part X of said bill of complaint.

11. That this defendant is not informed as to the correctness of the statements contained in Part XI of said bill of complaint, and therefore denies that the same are true, and asks that complainant be put to his proof.

12. That this defendant is not informed as to the correctness of the statements contained in Part XII of said bill of complaint, and therefore denies that the same are true and asks that complainant be put to his proof.

13. That this defendant admits that by the Interstate Commerce Commission classification operating expenses are classified under the five heads named in Part XIII of said bill; but that this defendant denies the other allegations of fact contained in said part XIII of said bill of complaint.

14. That this defendant admits that the Railroad constituting the receivership estate is used for transportation of commodities moving from points within to points without the State of Ohio, as well as commodities moving between points within the State of Ohio, as stated in Part XIV of said bill of complaint; but that as to the other matters set out in said Part XIV of said bill of complaint, this defendant is not informed, and therefore denies the same to be true, and asks that complainant be put to his proof.

62 15. That this defendant is not informed as to whether or not the tabular statement constituting part XV of the bill of complaint is correct, and therefore denies that the same is true, and asks that complainant be put to his proof.

16. That this defendant is not informed as to the correctness of the statements contained in Part XVI of said bill of complaint, and therefore denies that the same are true, and asks that complainant be put to his proof.

17. This defendant is not informed as to the correctness of the statements contained in Part XVII of said bill of complaint, and therefore denies that the same are true and asks that complainant be put to his proof.

18. That this defendant denies all and singular the averments contained in Part XVIII of said bill of complaint.

19. That this defendant admits that said No. 8 Ohio District is served by the Baltimore and Ohio Railroad, the Cleveland, Lorain and Wheeling Railroad and Pennsylvania Railroad, as well as the Wheeling & Lake Erie Railroad; admits that the rates in force for transporting coal from said No. 8 Ohio District to said lower lake ports are at present and for some time past have been, in substance, the same on all said railroads, and admits that no complaint has, as to the No. 8 lake coal rate, up to the present time been filed with said Railroad Commission of Ohio against any of said railroads other

than said Wheeling and Lake Erie Railroad; but this defendant denies the other averments contained in Part XIX of said bill of complaint.

20. That this defendant admits that said the Pittsburg Vein Operators' Association of Ohio filed a complaint and an amended complaint with the Railroad Commission of Ohio against The Wheeling and Lake Erie Railroad Company and B. A. Worthington, Receiver thereof, alleging that the rate charged for the transportation of No. 8 lake coal was unjust and unreasonable; admits that said The Wheeling and Lake Erie Railroad Company and B. A. Worthington, Receiver thereof filed an answer and an amended answer to said complaint with the Railroad Commission of Ohio; admits that said complaint came on for hearing and that at said hearing The Wheeling and Lake Erie Railroad Company and said B. A. Worthington, Receiver thereof, protested against the jurisdiction of said Commission and that said protest was overruled; admits that on the 28th day of February, 1910, said the Railroad Commission of Ohio made and entered an order as set out in Part XX of the Bill of complaint herein, and that a copy of said order was served on complain-
63 ant herein and on The Wheeling and Lake Erie Railroad Company on March 23rd, 1910, but this defendant says that prior to said 23rd day of March, 1910, to-wit, on the — day of ——, 1910, a copy of said order made and entered by said Railroad Commission of Ohio was mailed to one William M. Duncan, a director of said The Wheeling and Lake Erie Railroad Company and counsel for said railroad company and counsel for B. A. Worthington, Receiver of said Railroad Company; admits that the Statutes of Ohio impose a penalty on any railroad company which refuses to obey any lawful requirement or order of the Railroad Commission not enjoined or vacated by a court of competent jurisdiction, and provide that said Railroad Commission may compel compliance with its legal and subsisting orders by proceedings in mandamus, injunction or by other appropriate civil remedies, and provide that any railroad doing or permitting to be done anything prohibited or declared to be unlawful by said Railroad Commission Act, shall be liable in treble damages to the party injured by the doing of such unlawful acts, but this defendant says that by the Statutes of Ohio made and provided said finding and said order of said Railroad Commission are not final, and that said complainant in this case was and is by said Statutes allowed the right at any time within sixty (60) days after said order was given to commence an action in a Court of Common Pleas, against said Railroad Commission to vacate and set aside said order on the grounds that the rate fixed in said order is unlawful and unreasonable, and that if said Court of Common Pleas shall sustain said order of said Railroad Commission said complainant ha the further right under said Statutes of the State of Ohio at any time within sixty (60) days after service of a copy of the order or judgement of said Court of Common Pleas to appeal or take said case up on error to the higher courts of the State of Ohio in the same manner as in other civil actions, and that said complainant has commenced an action in the Court of Common Pleas of Franklin

County against said Railroad Commission of Ohio, praying said Court of Common Pleas to vacate and set aside said order of said Railroad Commission of Ohio, said cause being number 59005 in the Court of Common Pleas of Franklin County, State of Ohio.

Further answering this defendant denies each and every allegation of fact contained in Part XX of said bill of complaint not herein admitted to be true.

Wherefore, having fully answered all of the averments and allegations in said bill of complaint contained, this defendant prays
64 that said bill may be dismissed and that defendant may go hence without day, and that it may have and recover its costs and disbursements herein.

RAILROAD COMMISSION OF OHIO,
By U. G. DENMAN, *Attorney General.*

THOS. H. HOGSETT,
FREEMAN T. EAGLESON,
Of Counsel.

(Endorsement:) No. 7961. B. A. Worthington, etc., Plaintiff vs. Railroad Commission of Ohio, et al., Defendant. In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, in Equity. Answer of the above named defendant the Railroad Commission of Ohio to the Bill of Complaint of the above named plaintiff B. A. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company. M. B. & H. H. Johnson, Cleveland. Filed June 25, 1910. B. C. Miller, Clerk U. S. Circuit Court, N. D. O.

(Replication.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO et al., Defendants.

Replication.

This replicant, B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, saving and reserving to himself all and all manner of advantages and objections which may be had and taken to the manifold errors, uncertainties and insufficiences of the answer of the defendant, Railroad Commission of Ohio, for replication thereunto saith that he doth and will aver, maintain and prove the said bill of complaint to be true, certain and sufficient in the law to be answered thereunto by the said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in law

to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby *now* and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct; and humbly prays as in and by said bill of complaint he hath already prayed.

65 SQUIRE, SANDERS & DEMPSEY,
Solicitors for Replicant, B. A. Worthington, Receiver.

W. M. DUNCAN,
Of Counsel.

(Endorsement:) No. 7961. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Plaintiff vs. Railroad Commission of Ohio, Defendant. Replication. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. Squire, Sanders & Dempsey.

(*Testimony.*)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO et al., Defendants.

Testimony.

Testimony in the Above Entitled Cause Taken Before and Written Out by B. C. Miller, Clerk, in Open Court, under the 67th Rule in Equity as Amended and Pursuant to the Order of the Court, at the Final Hearing of said Cause Before the Honorable Robert W. Tayler, Judge of said Court, on the 25th Day of June, A. D. 1910.

Appearances:

For Complainant, Squire, Sanders & Dempsey, by W. M. Duncan.

For Defendant, U. G. Denman, Attorney-General of Ohio, by Freeman T. Eagleson, T. H. Hogsett.

Stipulation.

It is hereby stipulated and agreed between counsel for complainant and counsel for defendant, by and with consent of the court, that each party to this cause may offer as evidence in this case

extracts from the testimony in a certain hearing held before the Railroad Commission of Ohio, in which the Pittsburg Vein Operators' Association of Ohio were complainants and The Wheeling and Lake Erie Railroad Company and B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, were defendants.

66 Thereupon complainant, to maintain the issues on its part offered the following extracts from the testimony before said Railroad Commission of Ohio in evidence.

G. W. RISTINE, formerly assistant freight traffic manager for the Erie Railroad, offered as a witness by the Coal Operators in the proceeding before the Ohio Railroad Commission.

On direct examination witness testified as follows:

(R. 1564).

Mr. Ristine: The rail proportion of eighty-five cents to me looks unreasonable for two reasons, first, there is not sufficient differential with other fields taking into consideration the extra cost of mining which the railroad ought to always consider, and also the quality of the coal, and second, I cannot draw any particular distinction between coal delivered to a railroad and coal delivered to a vessel, both of which is destined to some foreign destination.

On cross-examination witness testified as follows:

(R. 1575).

Mr. Duncan: Now in considering this rate you have considered it, or you have considered the transportation of the coal from the Number Eight District through the Huron gateway as coal that is not destined for Huron but for points beyond, have you not?

Mr. Ristine: Sure.

Mr. Duncan: In other words, you have not treated this coal as local at Huron?

Mr. Ristine: No. Local coal at Huron would be commercial coal.

Mr. Duncan: In other words, in your conclusions you have treated this coal as coal moving from Ohio through the Huron gateway to points in the north-west and states beyond?

Mr. Ristine: You mean somewhere beyond. It may not go to the north-west states.

Mr. Duncan: It goes beyond Huron?

Mr. Ristine: It goes beyond Huron undoubtedly—the lake coal.

Mr. Duncan: They don't load coal into the holds of vessels to keep at Huron, do they?

Mr. Ristine: No, I guess not; I think not.

Mr. Duncan: So that your conclusion is based upon the assumption that this rate should be treated in precisely the same manner that a railroad company treats their proportional rates on other business?

Mr. Ristine: The same as they do on the Railway Fuel.

67 Mr. A. S. Dodge, witness offered by the coal operators, formerly vice-president and in charge of traffic on the C. & E. I.

On cross-examination witness testified as follows:

(R. 1502, 1503, 1519.)

Mr. Duncan: And therefore, in your answers and the conclusion which you have reached respecting this lake cargo rate you have treated the commerce as interstate commerce rather than state commerce?

Mr. Hogsett: We object to the question.

Commissioner Hughes: Answer the question.

Mr. Dodge: I could not lose sight of the fact that the ultimate destination of the coal was interstate.

Mr. Duncan: Did you take into consideration the conditions in the consuming markets at the head of the lakes?

Mr. Dodge: Final destination?

Mr. Duncan: Yes.

Mr. Dodge: No

Mr. Edward Johnson, witness offered by Coal Operators, coal operator situated at Columbus.

On cross-examination, witness testified as follows:

(R. 1075, 1074).)

Mr. Johnson: I have simply an interest—small amount of stock in the Northwestern Fuel Company; not enough to cut any figure though.

Mr. Duncan: That is the company to which the Lorain Coal & Dock Company consigns its cargo fuel?

Mr. Johnson: Some of it—part of it.

Mr. Duncan: I mean its cargo coal?

Mr. Johnson: We sell to the Northwestern Fuel Company just a any other company does. We have no other arrangements.

Mr. Duncan: Are you interested in the Fairmont field?

Mr. Johnson: No, sir.

Mr. Duncan: Is the Northwestern Fuel Company interested in the Fairmont field?

Mr. Johnson: I think so.

Mr. Duncan: So that it buys its coal from this Fairmont Company in which it is interested, as well as your Company?

Mr. Johnson: Yes, sir.

Mr. Duncan: Taking the number eight coal and the Fairmont coal up the lakes to this dock in the northwest?

Mr. Johnson: Yes, sir.

Mr. Duncan: Where is the dock of the Northwestern Fuel Company located?

Mr. Johnson: Oh, they have docks at different places.

68 Mr. Duncan: Well, name the places?

Mr. Johnson: Duluth, Green Bay—I hardly know where the docks are.

Mr. Woodford: Washburn probably.

Mr. Johnson: Washburn. These gentlemen know more about that than I do.

Mr. Duncan: Is your company sending coal up the lakes to any other source than the Northwestern Fuel Company this year?

Mr. Johnson: Yes, sir.

Mr. Duncan: What other coal?

Mr. Johnson: We are selling to the Central Coal Company.

Mr. Duncan: Is that affiliated with the Northwestern Fuel Company?

Mr. Johnson: No, sir.

Mr. Duncan: What other company do you sell to?

Mr. Johnson: Occasionally where we can sell a cargo of coal scattered through the district; I don't know particularly but no contracts with anybody other than those two.

Mr. Duncan: But your contracts for this season are for coal to be delivered to the Central——

Mr. Johnson: Central Coal Company.

Mr. Duncan: The Central Coal Company, the Northwestern Fuel Company, whose docks are on Lake Superior somewhere up in the northwest, and in addition to that, you probably will sell a little additional coal to stray purchasers?

Mr. Johnson: Anybody that wants to buy it, yes, sir.

Mr. Duncan: That constitutes your lake coal trade for this season or will constitute it?

Mr. Johnson: Yes.

Mr. W. R. Woodford, witness offered by Coal Operators: Upon cross-examination witness testified as follows:

(R. 1125).

Mr. Duncan: Now, I am interested in your statement as to the effect that the rates on the Wheeling & Lake Erie and other railroads had upon the rates you could get for your coal on the C. L. & W. Why should the rates on those railroads have any effect upon the rate on your road?

Mr. Woodford: The rates on their—or their coal and our coal went to common markets. We couldn't get any more money for our coal than they got for theirs.

69 Mr. Duncan: And unless you put the coal at Lake ports for shipment to the northwest at the same rates they were putting it up over the Wheeling & Lake Erie and other railroads you could not get any Lake traffic at all?

Mr. Woodford: We are not getting a large traffic. We could get some possibly.

Mr. J. J. Roby, witness offered by Coal Operators: On cross-examination witness testified as follows:

(R. 954, 955 and 956.)

Mr. Duncan: Do you ship coal to the northwest?

Mr. Roby: Do you mean lake coal?

Mr. Duncan: Yes.

Mr. Roby: Last year we shipped about 130,000 tons.

——— ———.

Mr. Roby: But our lake coal was sold to a party who has docks at various points on the lakes.

Mr. Duncan: Who is the party?

Mr. Roby: The C. Reiss Coal Company.

Mr. Duncan: Who is the C. Reiss Coal Company; is Mr. Somers interested in it?

Mr. Roby: No, sir.

Mr. Duncan: Any of the members of your company interested in it?

Mr. Roby: No, sir.

Mr. Duncan: Does the C. Reiss Coal Company take all of your tonnage?

Mr. Roby: They took all the lake tonnage we sold last year.

Mr. Duncan: You contract for your entire output of lake coal to him?

Mr. Roby: We sold him all the coal we could. He was to have taken more but he had to take some from West Virginia because he could not stand it to pay us the price.

Mr. Duncan: But he took all of your lake coal?

Mr. Roby: Yes, all that we shipped from number eight.

Mr. Duncan: And hauled it from his docks up the lake somewhere?

Mr. Roby: Yes.

Mr. Duncan: Where are his docks?

Mr. Roby: Some at Green Bay.

Mr. Duncan: Any at Duluth?

Mr. Roby: Yes.

Mr. Duncan: Any at Ashland?

Mr. FRANK OSBORNE, president of the Operators' Association, offered as a witness by the Coal Operators:

(R. 1268.)

On direct examination witness testified as follows:

70 Mr. Osborne: For the sake of handling our coal with the least possible trouble and expense to the railroad, we take some of our office men and while—we perhaps do it a little different from some of the rest, because we ship a great deal of Pennsylvania coal and other Ohio coals to the lake front; and we will take one man, if you please, and consign him to a certain port—take Lorain. We will send, say S. H. Robbins, who will take all of those grades of coal consigned to that point. He will take lump, run of mine, nut or slack, whichever it may be. When we order the boats we will order—give notice to the railroad that, for instance, the Hiawatha will be for loading about such a date. Sometimes it is a little shorter than that time and sometimes it overruns—depends upon the speed of the unloading of the boat; and tell them that S. H. Robbins for three-quarter, and they will get that coal ready—giving them sufficient time to run it down to the docks, so that they can handle

the coal at the best possible operation for them and the least delay to the boat possible.

(R. 1269.)

Mr. Hogsett: State those conditions.

Mr. Osborne: We take our coal—in the first place we fill up our mines with orders that we may have to deliver—or rail orders. Then the surplus of those different grades of coal we may order to the lake front, and it is just about on the same line as pouring in from four or five different mines, different streams into a tub, and then, as we want a cargo of coal, we take an order out of that tub—a dipper full or whatever we want for the boat and the freight, we pay to the lake front, and the vessel arrangements we make either by direct contract with the vessel concerned or we take a chance—what I mean by a chance, we keep out a certain percentage of our coal that is not contracted with any boat line and then we utilize a spot boat. For instance, that tub is getting full. The Railroad Company is going to shut off that coal running in there. So if we can get a spot boat we rush it out and dip it out and let it go on.

Mr. Hogsett: When this coal is shipped from the mines it is consigned, as you have stated, to some person in the employ of your company?

Mr. Osborne: Be consigned to one of our employés with the understanding that the railroad company that it is our coal when we pay the freight.

Mr. Hogsett: At the time it is shipped from the mines does your company know where any particular car load or train load of coal will finally go?

71 Mr. Osborne: Absolutely no; absolutely not. Unless it should be some time that there was a boat at the dock, and a shortage of coal, then we would be after the railroad to rush that coal; that is a very exceptional case now because there is plenty of coal at the lake front.

Mr. Hogsett: This coal is delivered to the purchaser, your purchaser, where, usually?

Mr. Osborne: When we purchase coal?

Mr. Hogsett: No, to the purchaser.

Mr. Osborne: Well, we do that anyway the fellow will take it; give him any kind of medicine he wants on it. The coal is sold very largely f. o. b. boat at the lake front, and that is all the basic price is, your coal f. o. b. at the lake front. Sometimes we will sell a man a block of coal at the lake front and he will request us to take a charter. We will take a chance on it or we may contract his coal.

(R. 1271.)

Mr. Osborne: The No. 8 coal, as I have explained, is thoroughly a steam coal; hence it takes the low prices and it is in competition with all the steam coal that there is from other states. It goes—we have a dock—the best comparison is from our own situation; we have a dock at the head of the lakes and we make a particular drive on our No. 8 coal; believing that was the weak member, and

forced it on the fuel proposition at the head of the lakes and in that market this year our prices are reduced from 20 to 30 cents a ton, with no decreased cost whatever.

(R. 1305, 1306, 1307.)

On cross-examination witness testified as follows:

Mr. Duncan: And the most of your lake tonnage, in fact all of your tonnage goes to the northwest to your northern Ohio coal docks?

Mr. Osborne: No, sir, we have some railroad trade outside that.

Mr. Duncan: That is a railroad trade in the northwest.

Mr. Osborne: Yes, sir, the northwest Canada.

Mr. Duncan: What point do you deliver your lake coal when consigned to the railroad trade?

Mr. Osborne: To Depot Harbor.

Mr. Duncan: You have no dock there?

Mr. Osborne: No.

Mr. Duncan: Your dock is located at what point?

Mr. Osborne: At West Superior, that is Duluth Harbor, you know.

Mr. Duncan: Now when you say that you do not know where the coal is to go that comes from the mine, you mean that you do
72 not know to what point in the north west each particular car of coal that is sent up to this bucket or tub at the lakes is to go?

Mr. Osborne: Either that or train load.

Mr. Duncan: Or train load?

Mr. Osborne: Yes, sir.

Mr. Duncan: But you are pouring it all into the tub?

Mr. Osborne: Sure.

Mr. Duncan: To be taken out?

Mr. Osborne: Yes.

Mr. Duncan: And distributed in the north west?

Mr. Osborne: To be taken to our dock or some other place on some other order that may come in.

Mr. Duncan: Well all of the coal that goes in there that takes the lake rate goes to the north west doesn't it?

Mr. Osborne: No, some of it goes to Detroit; some up along the river; some over into Canada—wherever we can get an order. Some of it we divert and we use locally.

Mr. Duncan: You pay the local rate if you divert it?

Mr. Osborne: Yes and take your demurrage charges too.

Mr. C. E. Maurer, witness offered by the Coal Operators. On direct examination witness testified as follows:

(R. 800 to 813.)

Mr. Hogsett: Now, Mr. Maurer, you ship coal from your mines to Huron and what other points on the Wheeling and Lake Erie?

Mr. Maurer: Only to Huron. We have shipped to Cleveland, but they are taking no coal there at this time.

Mr. Hogsett: That coal, or a part of it at least, is afterwards transported to various points on the great lakes?

Mr. Maurer: Part of it; part of it is used for vessel fuel.

Mr. Duncan: It takes another rate, doesn't it?

Mr. Maurer: Yes.

Mr. Hogsett: I wish you would explain to the Commission how your shipments from the mines of what is designated as lake coal, are made?

Mr. Maurer: On the Wheeling & Lake Erie the coal is weighed at the mine. The shipping clerk at the mine telephones the shipment into the office at Dillonvale. I mean the Wheeling & Lake Erie billing office at Dillonvale. Then in the evening, after the day's work is done, he makes out a mine report, one copy of which he sends to the agent at Dillonvale, one copy goes to Mr. Booth, of the Wheeling & Lake Erie, and one copy comes to our office.

Mr. Duncan: Who is it makes this report?

Mr. Maurer: The shipping clerk at the mine.

73 Mr. Duncan: Your shipping clerk?

Mr. Maurer: Yes; and this is a copy of the report that comes to our office, to Mr. Booth's office, and to the Wheeling & Lake Erie agent at Dillonvale (producing same).

Mr. Hogsett: We desire to offer this report which the witness has just submitted, in evidence and will ask to have it marked Exhibit 46.

And thereupon, the paper writing last above offered is admitted in evidence on behalf of the complainant and is hereto attached marked exhibit No. 46 and made part hereof.

Mr. Maurer: There are 29 cars of lake coal in that day's shipment.

Mr. Hogsett: Now go ahead with your answer.

Mr. Maurer: You refer to lake coal?

Mr. Hogsett: Yes.

Mr. Maurer: You understand that the lake coal referred to is lake coal that goes to Huron. It is consigned to the Glens Run Coal Company at Huron. If we have various grades of coal, we designate some of the office employés in whose name the coal is shipped. For example, if we were shipping mine run coal, we might call it S. B. Cooledge coal, or if we were shipping inch and a quarter lump, we might ship it to C. E. Sullivan in care of the Glens Run Coal Company, the name being for the purpose of designating the different grades of coal, and when we desire this coal loaded, we would notify the Wheeling & Lake Erie to load a certain vessel with C. E. Sullivan's coal, or Glens Run Coal or S. B. Cooledge coal, and that would simply indicate the grade of coal that was to be loaded on the vessel.

Mr. Maurer: When the coal leaves the mine it is simply marked "lake coal" and is consigned to Huron. At the time of shipment we do not know what boat will take it or to what point it will go, or whether en route part of it may not be reconsigned for some other purpose, or whether part of the coal will be used for fueling boats. That is no distinct car moved to any particular place or to any particular ultimate destination.

Mr. Hogsett: Other than Huron?

Mr. Maurer: Other than Huron. I may say when a boat is loaded we do not designate what cars shall be loaded on the boat, but the railroad company goes out and picks up sufficient cars of that grade of coal to load the boat.

74 Commissioner Hughes: Is this coal all subject to reconsignment at any time after it leaves the mines; that is do you hold that right or power to reconsign the coal?

Mr. Maurer: The coal all belongs to the Glens Run Coal Company after it arrives at Huron.

Commissioner Hughes: And it is subject to reconsignment at any time?

Mr. Maurer: Subject to reconsignment.

Mr. Duncan: I do not think the witness understands the question of the Commissioner.

Mr. Maurer: I certainly do.

Mr. Hogsett: When you have gotten a boat to deliver a cargo of coal, you make a bill for that cargo, do you?

Mr. Maurer: Do you want the steps as we go along, the steps we take?

Mr. Hogsett: Just state the steps that you take.

Mr. Maurer: When we secure a boat for loading a cargo of coal, the first step is to call up Mr. Titus, the assistant superintendent of the Wheeling & Lake Erie road and notify him that on a certain day a certain boat will be at Huron to load with Glens Run coal, and simply request him to have the coal there to load the boat. That is all we have to do with the railroad company. Ordinarily we cover with the vessel people our contract tonnage. In other words, if we are figuring on shipping 150,000 tons of lake coal we will probably distribute that tonnage among three or four shipping concerns. For example, the United States Transportation Company, the Gilchrist Transportation Company or some other transportation company covering that entire tonnage at a stated rate of freight to the different ports where we expect to ship. Then we notify these companies, whichever one we may select, that on a certain date we desire to load a cargo. They report to us the name of the vessel, if they have one. Immediately upon the receipt of that report we fill out what we call a charter confirmation, giving the capacity and name of the vessel, where to load, and to what destination she is to go, the rate of freight and any other information that may be necessary, what kind of a vessel, where the vessel is to report for fuel, and whatever instructions may be necessary with reference to the vessel.

Mr. Duncan: What is that last statement about reporting for fuel?

Mr. Maurer: Whether she reports for fuel or not and where the vessel is to report for fuel.

Mr. Duncan: What fuel?

Mr. Maurer: Her own fuel.

75 And thereupon, blank form of charter confirmation is offered and admitted in evidence on behalf of the complainant and is hereto attached marked Exhibit 47, and made part hereof.

Mr. Hogsett: Right in that connection, Mr. Maurer, let me ask you whether or not there is any portion of that coal delivered to the purchasers f. o. b. vessel at Huron?

Mr. Maurer: Practically all delivered to the purchasers f. o. b. vessel at Huron, although you may make a price at the other end, but as far as our shipments are concerned, we nearly always make them f. o. b. Huron or Cleveland.

Mr. Hogsett: Then where it is delivered f. o. b. vessel at Huron, these orders are orders given to the vessel owners?

Mr. Maurer: Yes, we call it a charter confirmation.

Mr. Hogsett: You do that for the purchaser of the coal?

Mr. Maurer: Yes, we do that for the purchaser of the coal. We charter the boats. We sometimes agree in selling the coal that we will take care of the charter. That is ordinarily the case that we will take care of the furnishing of vessels and the chartering.

Mr. Hogsett: You mean by furnishing the vessel, making the arrangement with the vessel owner?

Mr. Maurer: Yes.

Mr. Hogsett: For the use of the vessel to ship the cargo in?

Mr. Maurer: Yes; to ship the cargo in.

Mr. Maurer: If the Commission will let me go on, I can explain the whole transaction. After the vessel is loaded sometimes the Wheeling & Lake Erie call up and notify us that the boat has cleared and has been loaded with so many tons of coal, but ordinarily we wait until we get a report of this kind (producing same) from the dock superintendent at Huron showing the boat, the date she was loaded and the number of cars and the tonnage.

Mr. Maurer: Upon receipt of that notice usually the first thing we do is to insure the cargo. Then we make out bill of lading in this form (producing same) showing the destination, showing the name of the boat, showing the number of tons and the kind of coal, the rate of freight, consigned by ourselves as the consignor.

Mr. Hogsett: The lake freight, you mean?

76 Mr. Maurer: Yes; the lake freight. Then we mail this bill of lading to the consignee at Ashland or Duluth, as the case may be, mailing him two or three copies of the bill of lading, one of which he hands to the captain of the boat on his arrival there, and on that bill of lading the captain collects the freight. Sometimes that is done at the other end and sometimes at this end.

Commissioner Hughes: Is the coal that you land on the dock there always sold before you land it?

Mr. Maurer: No; it may be shipped and sold afterwards. When anybody wants a certain amount of coal we take it out of the bunch. There may be three or four or five hundred cars of coal there, and somebody calls up and says, "We want five hundred of this," or "six hundred of that grade of coal."

Mr. Maurer: Part of it may be sold. Sometimes we have a bunch sold before hand.

Mr. Hogsett: Mr. Maurer, you were saying something yesterday afternoon about insurance taken out on the cargo coal. Will you

state to the Commission how that is done. Who takes it out and for whose account and benefit is it taken out?

Mr. Maurer: If the coal is sold f. o. b. vessel Huron we take it out for the consignee, for and on account of the consignee.

Mr. Hogsett: Now, Mr. Maurer, you may state whether or not you dispose or sell any of this coal after it has been taken to Huron?

Mr. Maurer: We dispose of a great deal of it after it has been taken to Huron.

Mr. Hogsett: Do you re-consign any of the coal either en route or after it goes there to other points than Huron, in Ohio?

Mr. Maurer: Never after the——

Mr. Hogsett: I mean do you divert it?

Mr. Maurer: I was answering the question. Never after it gets to Huron because in order to divert to other points on the Wheeling & Lake Erie it would of necessity have to go back to Norwalk. But any coal that is on the siding prior to reaching Norwalk we frequently divert to other points.

(R. 824) (R. 825)

Commissioner Gothlin: Going back for a minute, there is one point that the commission is not clear on. I believe you
77 stated you shipped to the port right along whether you have orders or not?

Mr. Maurer: We always keep a quantity of coal on the dock provided we have any lake shipments whatever.

Mr. Arnold: That is you have the cars on the dock?

Mr. Maurer: We keep the cars on dock or substantially on the dock; They are along the line of the railroad some place.

Commissioner Gothlin: Briefly what is the reason you ship that way instead of waiting until you have orders for the coal?

Mr. Maurer: In order to have the coal. It is a large quantity ordinarily that you sell at one time. For example a boat of ten thousand tons capacity—an order for ten thousand tons would require a boat of that capacity. To accumulate that much coal and take care of your business unless you had a very large mine would mean three or four weeks before you could accumulate it.

Commissioner Gothlin: You anticipate that?

Mr. Maurer: Yes, we anticipate that. And we ship there what we term our surplus coal. For example we are running today and we have ten cars left over and if we had no consignee in Ohio or other points that surplus would go to the lakes to await orders for shipment up the lakes. But you understand we have orders. We have a certain tonnage sold all the time.

(R. 834) (R. 835)

Mr. Hogsett: Mr. Maurer, let me ask you another question. I will ask you whether or not some of the coal produced in the No. 8 district is put upon your own docks at lake ports?

Mr. Maurer: Yes, you mean at the head of the lakes?

Mr. Hogsett: Yes. Now that particular coal is used for commercial purposes, is it not?

Mr. Maurer: Steam and commercial.

Mr. Hogsett: That is put in competition with coal from other districts and from the West Virginia Districts, particularly in the commercial market?

Mr. Maurer: Do you mean all rail coal?

Mr. Hogsett: Yes, sir.

Mr. Maurer: Yes, sir. It meets in competition with all rail coal shipped from West Virginia via ferry lines and via Chicago.

Commissioner Hughes: Where there is a reconsignment of coal that comes from these lines to lake ports it may become commercial coal, that is true.

78 (R. 836)

Mr. Hogsett: Yes, and when it goes out into the interior there it meets West Virginia coals?

Mr. Hogsett: In competition with this particular coal from the No. 8 District. Now that coal has gotten into that community up there in the same way probably that some of this has and some of it has gotten in there by all rail route.

Mr. Hogsett: Yes, it is a charge on the coal. Then that same coal—some of it gets into the markets in the interior after it reaches the head of the lakes and when it gets there it meets the coal from West Virginia.

(R. 870, 871)

Commissioner Sullivan: Mr. Maurer, if you would ship your coal by rail and not partially by boat wouldn't it be very materially—in other words don't the loading in the boat and unloading make you a lot of slack?

Mr. Maurer: Yes.

On cross-examination, witness testified as follows:

(R. 878 to 886, inclusive)

Mr. Duncan: Has your company a dock at the head of the lakes?

Mr. Maurer: Yes, we are interested there.

Mr. Duncan: What portion of your lake coal is consigned to that dock?

Mr. Maurer: Last year I think better than ninety per cent of it went—no, there wasn't that much last year. Last year probably 75 per cent of it went on our own dock.

Mr. Duncan: But 75 per cent of your lake coal is put on your own docks.

Mr. Maurer: Yes.

Mr. Duncan: Where?

Mr. Maurer: At Ashland.

Mr. Duncan: How far is Ashland from Duluth?

Mr. Maurer: I think it is—I cannot tell you the distance; probably ninety miles, I should judge, or something like that; probably more than that by rail.

Mr. Duncan: And the rest of your lake coal goes to Duluth, does it?

Mr. Maurer: No.

Mr. Duncan: To the independent docks there.

Mr. Maurer: No; last year the outside coal which we sold went to Milwaukee.

79 Mr. Duncan: Did it go to Milwaukee by the rail and lake route or by the cross ferry route?

Mr. Maurer: By the lake.

Mr. Duncan: That is, the coal was taken to Huron and there reshipped and went up around the lakes to Green Bay?

Mr. Maurer: Yes.

Mr. Duncan: What disposition did your company make of the coal that was consigned to your docks at Ashland—was it Ashland?

Mr. Maurer: Yes.

Mr. Duncan: For what purpose was it used?

Mr. Maurer: The large majority of the coal went for railroad fuel.

Mr. Duncan: At Ashland?

Mr Maurer: Yes; some of it went for commercial purposes.

Mr. Duncan: To what company?

Mr. Maurer: To what companies?

Mr. Duncan: Yes, what railroad companies?

Mr. Maurer: The Northwestern and I think the Wisconsin Central or the Canadian Pacific or the Northern Pacific, I should say.

Mr. Duncan: What proportion of the tonnage at your Ashland dock was used for those purposes by these railroads?

Mr. Maurer: I should say sixty per cent.

Mr. Duncan: And the balance for commercial purposes?

Mr. Maurer: The balance for commercial steam trade?

Mr. Duncan: What do you mean by commercial steam trade?

Mr. Maurer: I mean it went to points probably west as far as in to the Dakotas and to points in Wisconsin and Minnesota.

Mr. Duncan: Didn't any of it come back to St. Paul and Minneapolis?

Mr. Maurer: Very little of our coal gets into St. Paul on account of the rate from Southern Illinois which cuts us out of St. Paul and Minneapolis.

Mr. Duncan: The cross lake ferry lines put it into St. Paul?

Mr. Maurer: No, not cross lake ferry lines, but the rate from southern Illinois to St. Paul and Minneapolis cuts us out.

Mr. Duncan: Was any of your coal used at the Zenith furnaces; that is near your docks at Ashland?

80 Mr. Maurer: I think the Zenith furnaces used Pittsburg nut that we brought from Pittsburg——

Mr. Duncan: Didn't use any of your coal?

Mr. Maurer: No, I think not. Did you say the Zenith furnace company?

Mr. Duncan: Yes.

Mr. Maurer: No, I don't think any was used at the Zenith furnace. I was thinking of the Ashland Furnace Company.

Mr. Duncan: The Ashland Furnace Company used none of your coal?

Mr. Maurer: I think not. They might have used a little. Very small quantity if they used any of it. I think they use Pittsburg nut coal. I don't know whether that is the name of the concern. I know there is a furnace there—a charcoal furnace there or something of that kind.

Mr. Duncan: Now, your average freight rate from the Ohio lake ports to the Northern lake ports will average anywhere from thirty to thirty-five cents a ton, will it not, dependent upon the season?

Mr. Maurer: In 1907, I think we paid the major part of the season, thirty-five cents, but the latter part of the season we paid as high, I think as $1.25.

Mr. Duncan: But that was where you were without contracts?

Mr. Maurer: Yes, that was, as I said, on wild cargoes.

Mr. Duncan: In other words, you had underestimated the amount of coal you would ship up the lake and had failed to make provisions for this shipment?

Mr. Maurer: It was wild tonnage, as I explained. It was not contract tonnage.

Mr. Duncan: And I say the reason is that you did not contract for that amount of tonnage is because you underestimated the amount of coal you would ship up the lake and had failed to make provisions for its shipment?

Mr. Maurer: I think the real reason was on account of the demand for vessels that year that were only able to cover a certain portion of the tonnage. The vessel rates depend to a great extent on the law of supply and demand.

Mr. Duncan: And you were caught at the end of the season?

Mr. Maurer: We were caught at the end of the season.

Mr. Duncan: And had to pay the monopoly prices?

Mr. Maurer: We had to pay the going prices.

Mr. Duncan: On how many cargoes did you pa*id* $1.25?

81 Mr. Maurer: I couldn't tell you the exact number on which we had to pay a higher rate than one dollar, but it was on several carloads; I couldn't tell you how many.

Mr. Duncan: But the average will approximate around 35 cents?

Mr. Maurer: I think the average will run 35 cents.

Mr. Duncan: So that you were able to transport this railroad fuel coal from the number eight district up to the Ashland district for approximately about $1.20 or $1.25 a ton?

Mr. Maurer: Yes, along side dock.

Mr. Duncan: Now, as I understand you, Mr. Maurer, your company by means of letters, arranges for the transportation of what you estimate will be your tonnage for the northwest for the season?

Mr. Maurer: Yes

Mr. Hogsett: What do you mean by "your company"; do you mean the dock company or the coal company?

Mr. Duncan: Don't you understand my question, Mr. Maurer?

Mr. Maurer: Yes, you said "Your company"; and when I speak of our company, I mean the Glens Run Coal Company, if that is what you mean?

Mr. Duncan: That is what I mean.

Mr. Maurer: The Glens Run usually covers what we estimate the tonnage to be.

Mr. Duncan: And that arrangement is confirmed, as you have stated by letters?

Mr. Maurer: Sometimes by contract drawn up and signed by both parties and sometimes—ordinarily simply by letter.

Mr. Duncan: But it is a contract for the covering of what you estimate will be the shipment to the northwest for a certain season.

Mr. Maurer: Yes.

Mr. Duncan: And it is pursuant to that contract that the various vessels in which you ship this coal go to the port at which you send it for transhipment which in the case of your mines on the Wheeling & Lake Erie is at Huron?

Mr. Maurer: If it should be a contract vessel. Lots of times we get vessels outside of that.

Mr. Duncan: I mean one of the vessels with whom you have made arrangements at the commencement of the season.

Mr. Duncan: No, I understand that. So that your company at the beginning of the season estimates the quantity of coal it
82 wants to ship to the northwest ports or to your dock or to an independent dock?

Mr. Maurer: Yes.

Mr. Duncan: And you proceed to start that amount of coal to the northwest; sometimes you do not sell it in advance; isn't that true?

Mr. Maurer: Yes.

Mr. Duncan: So that you take it in your own dock in the northwest and hold it, don't you?

Mr. Maurer: Why, we usually——

Mr. Duncan: Answer my question.

Mr. Maurer: Yes, we put it on our dock.

Mr. Hogsett: What do you mean by your own dock?

Mr. Maurer: Well, the Glens Run Coal Company don't own any dock.

Mr. Duncan: It is the dock in which the Glens Run Coal Company is interested.

Mr. Maurer: Yes, that is all. No, I will take that back. The Glens Run Coal Company is not interested in it, but officers of the Glens Run Coal Company are interested in it.

Mr. Duncan: Well, it is the same thing. You do not treat it as an independent concern, do you?

Mr. Maurer: It has no connection with the Glens Run Coal Company.

Mr. Duncan: But it has the same officers?

Mr. Maurer: The same officers, yes sir.

(R. 888 and 889)

Mr. Duncan: Now, going back to this transportation of coal from the number eight district to the northwest territory, as I understand

you, some of your coal proceeds from the mine without being sold or before you have made a contract of sale?

Mr. Maurer: Sometimes—quite frequently, yes, sir.

Mr. Duncan: But the estimate that has governed your contract with the transportation company is presumed to cover what in your judgment as a coal man think will be your lake shipment for that year, providing you can get the transportation companies to contract up that high.

Mr. Maurer: If you will put the horse at the other end of the cart, you will have it right.

Mr. Duncan: I will put it the other way then.

Mr. Maurer: This year we have shipped 25,000 tons to the lakes before we had any vessel contract and that is done very frequently.

Mr. Duncan: All right; but you make your fuel contracts as early in the season as you can?

Mr. Maurer: No, we could have made them last January if we had wanted to, but we didn't.

83 Mr. Duncan: All right; how late in the year do you make them?

Mr. Maurer: I think we covered our vessel tonnage along about the 1st of June this year.

Mr. Duncan: You have covered your lake tonnage for this year, have you?

Mr. Maurer: I do not think we have it all covered.

Mr. Duncan: You are still at it, are you?

Mr. Maurer: I think not.

Mr. Duncan: Why aren't you at it?

Mr. Maurer: Because there are plenty of vessels and we can get boats whenever we need them.

Mr. Duncan: But if there were not plenty of vessels you would contract in advance, as far as you could?

Mr. Maurer: We would probably try to.

Mr. Duncan: But there are plenty of eggs on the market and you saw no necessity for buying them all up in advance?

(R. 891.)

Mr. Duncan: With this rate of 90 cents, Mr. Maurer, and your lake rate of 30 cents, you are able to get your coal into the northwest which, as you have testified, is used both for railway fuel and for commercial steam purposes?

Mr. Maurer: Yes, and there may be some of it used for domestic purposes; I don't know.

(R. 895, 896 and 897.)

Mr. Duncan: Now, this coal that goes forward to Huron for the lake is classified as I understand you by the names of the consignee; that is, you send it forward under one name if it is three-quarter coal; is that it?

Mr. Maurer: Yes.

Mr. Duncan: And under another name if it is the run of the mine?

Mr. Maurer: Yes.

Mr. Duncan: And what other classification do you have?

Mr. Maurer: Slack or nut. Ordinarily we would have a separate classification although sometimes we do not.

Mr. Duncan: And do you advise the railroad companies of the name that is to indicate the quality of the coal?

Mr. Maurer: I do not know what the Wheeling & Lake Erie does, whether they ask us for that or not.

Mr. Duncan: How would they sort it then when it reaches Huron and they wanted to load one boat with a certain quality or class of coal?

Mr. Maurer: They might ascertain it by the billing; part of it being billed mine run and part three-quarter and part inch and a quarter.

84 Mr. Duncan: Would it be billed three quarter when consigned?

Mr. Maurer: Yes.

Mr. Duncan: What is the object of having it billed in the name of a particular person for purposes of identification if it is identified by classification as you have just suggested?

Mr. Maurer: Another way of designation.

Mr. Duncan: An additional identification.

Mr. Maurer: Yes.

Mr. Duncan: As a matter of fact your company and all other companies give the railroad company the key as you may say showing what name means what kind of coal?

Mr. Maurer: Yes—we hardly ever do with the Wheeling & Lake Erie, but we always do with the Pennsylvania.

Mr. Duncan: Why don't you with the Wheeling & Lake Erie?

Mr. Maurer: Because we seldom ship more than one grade of coal over the Wheeling & Lake Erie.

Mr. Duncan: But if you did, you would probably advise them?

Mr. Maurer: We would notify them before we loaded it, yes, sir.

Mr. Duncan: So that they would know whether S. B. Cooledge coal for instance was the quality of coal you wanted loaded on a particular boat or not?

Mr. Maurer: Yes.

Mr. Duncan: So that when you have accumulated a cargo at Huron or along the line and your boat has arrived at Huron, they would know what cars to take out and unload into the boat; if you were wanting to fill it with that particular quality of coal?

Mr. Maurer: We may have three or four cargoes.

Mr. Duncan: And the same would apply to three or four cargoes?

Mr. Maurer: We would not know what particular cars, but we would know the particular grade of coal.

Mr. Duncan: Of the coal in cars that had moved forward to Huron for lake shipment?

Mr. Maurer: Yes.

(R. 930.)

Mr. Maurer: I want to say to the Commission that prior to 1903 and 1904, outside of one or two docks, none of the railroads of the northwest used number eight coal for railroad fuel purposes, and through the efforts of the eastern Ohio operators and their dock facilities in the years 1906 and 1907, we succeeded in in-
85 ducing the railroads to take large quantities of this coal. The northwestern railroads sent their fuel inspector down and I spent three days with him in the mines in eastern Ohio, and finally got them to consent to take 40,000 tons of number eight coal, which is practically the first coal they have taken. We built up that trade and that trade is now being taken away from us.

Mr. Arnold: By whom?

Mr. Maurer: By West Virginia.

(R. 940.)

On re-direct examination witness testified as follows:

Mr. Maurer: When the dock company at the head of the lakes desires a cargo they notify us that they would like to have a cargo shipped of a certain tonnage, asking us to insure it, to secure the vessel and report to them the name of the vessel and the tonnage, which we do, notifying them by wire of the date of clearance and the number of tons.

Mr. Hogsett: Now, you were asked about the total transportation cost from the mine to the dock at the head of the lakes and you have said that that would aggregate about $1.20. When the coal is taken to the head of the lakes to the dock company it has to be taken from the boat and there put on board cars, does it not?

(R. 941.)

Mr. Hogsett: I will call your attention to the statement made in the minutes of the proceedings of a special meeting of the representatives of dock owners, ferry lines and railroads interested in the transportation of bituminous coal via rail and lake, and Lake Michigan car ferry lines held at Chicago, Illinois, on Tuesday, January the 12th, 1909, and which was read in evidence as follows:

"Freight, mines to lake	.90
Average Lake rate	.35
Handling charge on dock	.42
Loss and degradation in handling	.30
Carrying coal on docks, interest charge	.06
Making a total of	2.03"

I will ask you if that is approximately correct?

Mr. Maurer: By whom was that prepared?

Mr. Arnold: Twenty three dock managers.

Mr. Hogsett: By the dock managers.

Mr. Maurer: I should think that was a very fair statement of the cost of the coal including those charges. I notice there they figure the degradation in cents instead of percentage. I figured it at twenty per cent, and I see there that the figure degradation at thirty cents a ton.

86 Mr. B. W. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company. On cross examination by Mr. Duncan, witness testified as follows:

(R. 1684.)

Mr. Duncan: The rate f. o. b. vessel requires the shipper to furnish the vessel.

Mr. Worthington: Yes, sir.

(R. 1685.)

Mr. Duncan: And you are unable to load the coal into the vessel unless the vessel owner consents?

Mr. Worthington: Exactly.

Mr. Hogsett: Does it require the shipper to furnish the vessel any more than it does anybody else?

Mr. Worthington: It requires the shipper, because the shipper arranges with us to place the coal aboard the vessel. We would not take an order from the consignee. The shipper instructs us what boat he wants that coal put into.

Mr. Duncan: Would you ship that coal to Huron f. o. b. vessel without knowing what the shipper intended to furnish you a boat in which to load it?

Mr. Worthington: No. The reason the rate is made ninety cents is because we understand that we are furnishing what is known as lake coal and that must be loaded on board vessel as soon as the shipper instructs us what boat he wants the coal loaded into.

Mr. Duncan: For transportation to the northwest?

Mr. Worthington: For transportation to the northwest.

(R. 1960.)

Mr. Duncan: Why is it your company has a lower rate on the lake coal passing through the Huron gateway than it has on commercial coal delivered in Huron?

Mr. Hogsett: We object to that question unless this witness made the rate.

Mr. Duncan: He is responsible for the rate.

Commissioner Hughes: I suppose he is answerable for the rates in effect.

Mr. Hogsett: If he did not make them he may not know the reason why they were made. It may have been the policy of the management to adopt rates made by somebody else but the question is here what was the reason for making that rate. Now if he reason for his making that rate was because it was made by somebody else that is one thing. But I understand the question to go the reason for making this rate originally. Unless he made it he would not know what the reason was except as he may have heard what
87 the reason was. The best evidence as to the reason for the making of the rate should come from those who actually made it.

(R. 1961.)

Mr. Duncan: I will repeat the question. Why is it your custom to have a lower rate on lake coal passing through Huron gateway than it is on commercial coal delivered in Huron?

Mr. Worthington: Simply because it is made on the basis of a through rate and to enable No. 8 lake coal to be marketed at Duluth and the northwest delivery points.

Mr. T. R. Gilmore, Superintendent of The Wheeling & Lake Erie Docks at Huron, and in charge of the loading of coal into the vessels, witness offered by the Railroad Company.

On direct examination witness testified as follows:

(R. 2199), (2200).

Mr. Duncan: Your jurisdiction is confined to the loading and unloading of the vessels?

Mr. Gilmore: Yes.

Mr. Duncan: Now do you keep a record of the cars that are unloaded with coal?

Mr. Gilmore: Yes.

Mr. Duncan: In what shape?

Mr. Gilmore: Well, a list of all coal that is loaded in the boats. We check against the agent's list and then we make our cargo manifest or statement from that.

Mr. Duncan: What do you mean by cargo manifest or statement?

Mr. Gilmore: Well, we furnish the shipper with a cargo statement of the car numbers and weights of all coal loaded into the boat, whether cargo or fuel.

Mr. Duncan: That is that has been loaded into a particular boat?

Mr. Gilmore: Yes; the boat's name is at the head of the cargo statement.

Mr. Duncan: And are blanks for that particular purpose furnished you by the shippers?

Mr. Gilmore: Yes.

Mr. Duncan: Are the blanks all the same?

Mr. Gilmore: No; different forms but practically the same heading.

Mr. Duncan: And that information that you furnish them is furnished on the blanks which they have furnished you?

Mr. Gilmore: Yes.

Mr. Duncan: Do you know what use is made of that cargo manifest or statement?

88 Mr. Gilmore: The bill of lading is made from the cargo statement.

Mr. Duncan: What if any trimming service is performed by your company in loading coal into vessels?

Mr. Gilmore: Yes, we have to do the trimming of the coal in the boats.

Mr. Duncan: Do you trim by machinery?

Mr. Gilmore: Well, we have an automatic trimmer on the machine, but of course it does not trim all the coal.

Mr. Duncan: How do you trim the portion that is not trimmed by automatic machinery?

Mr. Gilmore: With men.

Mr. Duncan: Where do the men have to go?

Mr. Gilmore: In the hold of the boat.

Mr. Duncan: And what does that trimming consist of?

Mr. Gilmore: Well in getting the coal back under the docks and back under the boilers so as to get the full load of coal on the boat.

(R. 2201.)

Mr. Duncan: What I want to know is can you tell with any degree of certainty when boats will be coming in or whether they are coming in at different periods?

Mr. Gilmore: Well, of course the coal shipper reports to Mr. Titus when they have a boat coming to Huron and about what time she will be there and Mr. Titus wires me.

(R. 2204, 2205, 2206 and 2207.)

Commissioner Gothlin: What did you mean a few moments ago when you said something about the bill of lading being made up on the cargo statement?

Mr. Gilmore: Well, of course the cargo statement, that gives the tonnage.

Commissioner Gothlin: What bill of lading is made up?

Mr. Gilmore: The bill of lading that the boat is billed out on.

Commissioner Gothlin: You mean the lake bill of lading?

Mr. Gilmore: Yes, the lake bill of lading.

Mr. Gilmore: Yes. The bills of lading used to be made altogether in the dock offices, but the last six or eight years they have been made in the coal offices and we furnish this cargo statement to the coal shipper showing the car numbers, the weights and the total tons of coal in the boat and then the bills of lading are made by the coal shipper at their office.

Commissioner Gothlin: Who signs it?

89 Mr. Gilmore: We sign the cargo statements. I sign the cargo statement.

Commissioner Gothlin: Who signs the bill of lading?

Mr. Gilmore: The shipper.

Commissioner Gathlin: You do not mean that the shipper signs the bill of lading?

Mr. Gilmore: Yes, showing that he has shipped so much coal.

Commissioner Gothlin: Isn't it the vessel company?

Mr. Gilmore: No, sir; the shipper of the coal shows that he has shipped in good order on that date so many tons of coal to such and such a place.

Commissioner Gothlin: Those are the shipping instructions, are they, don't the steamship company give the bill of lading showing that they have received so many tons of coal to be transported to a certain point?

Mr. Gilmore: No, because the steamship company would not know anything about the tons of coal that they had received. It is the shipper that makes out those bills.

Commissioner Gothlin: Who charters this boat?

Mr. Gilmore: The coal shipper.

Commissioner Gothlin: Do you mean the operator at the mine?

Mr. Gilmore: No, sir, in most cases the party to whom the coal is consigned, that is at Huron. For instance, the coal comes into Huron billed to M. A. Hanna & Company and M. A. Hanna & Company charters the boat for that particular kind of coal—train coal. They charter the boat for that coal to carry it.

Commissioner Gothlin: And Hanna is the party who mines the coal?

Mr. Gilmore: Well I should judge so, yes, sir.

Mr. Duncan: The same as the Glens Run Coal Company?

Mr. Gilmore: Well, that is Mr. Maurer. But there are cases where the man who wishes the bill of lading I guess is not a miner of coal but he buys the coal from the mines and ships it billed to himself, as in the case of C. Reiss. Mr. Kennedy takes the coal for the C. Reiss Coal Company and the coal comes in billed to C. Reiss.

Mr. Arnold: Where is C. Reiss & Company?

Mr. Gilmore: Well, he is in Milwaukee, I think.

Mr. Duncan: His docks are at Milwaukee?

Commissioner Gothlin: After you put it into the vessel you cease to have anything to do with it?

90 Mr. Gilmore: Yes, sir.

Mr. Duncan: But the railroad company's duty is not ended until it is trimmed in the boat?

Mr. Gilmore: No, sir.

Mr. Duncan: And until it furnishes this cargo statement?

Mr. Gilmore: Yes.

Mr. J. P. Orr, witness offered by the Receiver. On direct examination witness testified as follows (R. 2309):

Mr. Duncan: Where is the Central Market in the Northwest?

Mr. Orr: St. Paul, Minneapolis, and points beyond that.

Mr. Duncan: So that coal that moves via the lakes as well as that which moves across the lakes meets in that common territory in the northwest?

Mr. Orr: Yes, sir.

(R. 2310.)

Mr. Duncan: What do you mean by "if the rate to Duluth

Mr. Orr: Undoubtedly be reduced in proportion. The rate today for instance from the No. 8 district say to Duluth is one dollar per ton. If the rate up to Duluth was reduced almost to one dollar a ton it can be readily seen we could not maintain a dollar a ton rate to Duluth and in that territory.

Mr. Duncan: What do you mean by "if the rate to Duluth were——

Mr. Orr: I mean the proportional rate which we term the lake cargo rate plus the vessel rate—I mean the addition of those two together would make a rate such as would interfere with the trade through Michigan.

Mr. Duncan: In what way do the railway companies treat the lake rate?

Mr. Orr: As a proportion of a through rate.

Mr. Duncan: Through rate to what point?

Mr. Orr: To the Detroit River and the northwest.

Mr. Duncan: In connection with the vessel carriage?

Mr. Orr: Yes, it is a proportional rate, is what it really is. Now if that rate was reduced—if what I said here would follow it means that on lake coal there would be a reduction on about fifteen million tons of coal and on the coal to the west generally there would be a reduction on probably forty million to forty-five million, or fifty million of tons of coal.

91 Mr. H. M. Matthews, coal and ore agent of the B. & O. Witness offered by the Receiver. On direct examination witness testified as follows (R. 2452, 2454):

Mr. Duncan: Now what is your justification for the existing lake cargo rate being less than the commercial rate?

Mr. Matthews: Well it is in effect a proportional rate.

Mr. Duncan: Proportional of what?

Mr. Matthews: Proportional rate to which is added the vessel rate beyond.

Mr. Duncan: And what is the point beyond that is taken into consideration?

Mr. Matthews: Well the whole territory, the bulk of the tonnage of course it is understood goes to Lake Superior and Lake Michigan; and in the discussions I have heard at different times the vessel rates to those lakes were the ones that were mentioned in particular.

Mr. Duncan: Why is it that the lake rate from a particular district to all the lower ports is the same rather than different in view of the fact that you treat it as a proportional rate?

Mr. Matthews: Well, I assume that that is to equalize the through rate; the vessel rate being the same beyond the ports.

Mr. Duncan: That is the vessel rate is the same from all Lake Erie ports to the northwest?

Mr. Matthews: Yes. If there were different rates by vessel the probabilities are that the roads would have established different inland rates the same as they have done to the seaboard on the eastern.

(R. 2454.)

Mr. Duncan: So that your company in the adjusting of those differentials has done what would be done if the lake rates on the lakes were different to different ports?

Mr. Matthews: Yes, take into consideration the vessel rates.

THE GLEN'S RUN COAL COMPANY.

Statement of Coal Loaded and Shipped June 26th, 1908. ..... Mine.

Order No.	Car Initial No.	Weight	Size	Consignee	Destination	Route	Account of	Freight Prepaid
Mine	W & L E 44710	87,500	3–4	Wab. R. R. Co., % E. Wright S. K.	Springfield, Ill.	Wabash	C. A. How	St. Louis.
#2	" 41755	87,000	"	S. P. Bennett Fuel & Ice Co.	Grand Rapids, Mich	G R & I	Consignee	
#1	" 40497	87,000	"	Erie Stone Co.	Willshire, Ohio	Clover Leaf	"	Van Wert, O.
	" 44784	86,700	"	Erie Stone Co.	Willshire, Ohio	"	"	Van Wert, O.
	" 8726	54,300	"	W & L E R. R. Co.	Cleveland, Ohio		G. L. Pollock	
#2	" 9020	55,000	"	W & L E R. R. Co.	"		"	
1	" 8756	54,500	"	W & L E R. R. Co.	"		"	
2	" 9314	54,700	"	W & L E R. R. Co.	"		"	
2	" 10001	54,000	"	W & L E R. R. Co.	"		"	
2	" 8737	54,200	"	W & L E R. R. Co.	Mingo Jct., Ohio		"	
2	" 9959	54,700	"	W & L E R. R. Co.	"		"	
1	" 9344	55,300	"	W & L E R. R. Co.	"		"	
1	" 30103	54,200	"	W & L E R. R. Co.	Columbia, Ohio		"	
#1	" 41205	87,000	"	Glen's Run Coal Co.	Huron, Ohio	Lake Coal		
	" 12193	63,000	"	Glen's Run Coal Co.	"	"		
	" 5460	101,100	"	Glen's Run Coal Co.	"	"		
	" 8865	54,500	"	Glen's Run Coal Co.	"	"		
	" 11281	54,100	"	Glen's Run Coal Co.	"	"		
#2	" 42052	87,800	"	Glen's Run Coal Co.	"	"		
	" 8725	54,000	"	Glen's Run Coal Co.	"	"		
	" 11525	54,200	"	Glen's Run Coal Co.	"	"		
	" 10135	54,000	"	Glen's Run Coal Co.	"	"		
	" 6435	91,100	"	Glen's Run Coal Co.	"	"		
	" 9018	53,000	"	Glen's Run Coal Co.	"	"		
	" 10084	53,500	"	Glen's Run Coal Co.	"	"		
	" 5778	102,100	"	Glen's Run Coal Co.	"	"		
	" 40934	88,000	"	Glen's Run Coal Co.	"	"		
#1	" 11526	55,000	R of M	Paragon Refining Co.	Toledo, Ohio		Consignee	
	" 5085	101,100	"	Collins Hahn & Dalzell.	Jackson, Mich	M. C.	Consignee	
	" 5401	99,100	Slack	Paragon Refining Co.	Toledo, Ohio		Consignee	
	" 41166	87,700	"	National Tube Co.	Lorain, Ohio		Consignee	
	" 44774	83,700	"	National Tube Co.	"		"	
	" 55419	97,600	"	Golf Kirby Coal Co.	Cleveland, Ohio		Cuyahoga Coal Co.	
	" 55104	98,600	"	Golf Kirby Coal Co.	"		"	
	" 55087	97,600	"	Golf Kirby Coal Co.	"		"	

One hour delay on #1 side account of water in motor road.

W & L E 55060 shipped to the National Tube Co., at Lorain Ohio, on the 17th inst should read 55600 100,600.

W & L E 11202 billed to the Clarkson C. & D. Co., on the 24th inst. has been re-consigned to Glen's Run Coal Co., Huron, Ohio.

Defendant's Exhibit 22.

(*M. A. Hanna & Co. Letter.*)

CLEVELAND, O., *June* 18, 1909.

Mr. F. P. Barr, S. C. S., W. & L. E. R. R., City.

DEAR SIR: We have sold a certain tonnage of No. 8 coal that is to go to Escanaba for the C. Reiss Coal Co. and they request that this coal be shipped to to their own consignee and have selected the name, "F. I. Kennedy." They expect to float one cargo this month of between 7800 and 9000 tons and we will commence shipment on this order about Tuesday or Wednesday next week. We
92 give you this as a matter of information, so that when this coal is offered under the name of Kennedy, you will know for whom it is intended.

Yours very truly,

M. A. HANNA & CO.,
By (W. P. SCHAUFELE).

WPS-N.

Copy to—Mr. A. P. Titus, Asst. Supt., Canton, Ohio.

(Here follows Exhibit 22, marked page 93.)

94 Thereupon the defendant, to maintain the issues on its part, offered the following extracts from said testimony before the Railroad Commission of Ohio in evidence:

Mr. MAURER, a Number Eight operator called as a witness by the complainant.

Mr. HOGSETT: Now, Mr. Maurer, you ship coal from your mines to Huron and what other points on the Wheeling & Lake Erie?

Mr. MAURER: Only to Huron. We have shipped to Cleveland but they are taking no coal there at this time.

Mr. HOGSETT: That coal, or a part of it at least, is afterwards transported to various points on the great lakes?

Mr. MAURER: Part of it; part of it is used for vessel fuel.

Mr. DUNCAN: It takes another rate, doesn't it?

Mr. MAURER: Yes.

Mr. HOGSETT: I wish you would explain to the Commission how your shipments from the mines of what is designated as lake coal are made?

Mr. MAURER: On the Wheeling & Lake Erie the coal is weighed at the mine. The shipping clerk at the mine telephones the shipment into the office at Dillonvale. I mean the Wheeling & Lake Erie billing office at Dillonvale. Then in the evening, after the day's work is done, he makes out a mine report, one copy of which he sends to the agent at Dillonvale, one copy goes to Mr. Booth, of the Wheeling & Lake Erie and one copy comes to our office.

Mr. DUNCAN: Who is it makes this report

Mr. MAURER: The shipping clerk at the mine.

Mr. DUNCAN: Your shipping clerk?

Mr. MAURER: Yes, and this is a copy of the report that comes to our office, to Mr. Booth's office, and to the Wheeling & Lake Erie Agent at Dillonvale (producing same).

Mr. DUNCAN: Will you produce a few of those for last year's shipments?

Mr. MAURER: I think I can, yes, sir.

Commissioner GOTHLIN: Is that a daily sheet?

Mr. MAURER: Yes.

Commissioner GOTHLIN: Over the one tipple?

Mr. MAURER: Yes.

Commissioner GOTHLIN: How many cars?

Mr. MAURER: I think about 45 or 46 cars here. That was over the two dumps and one tipple.

Commissioner GOTHLIN: How often are they pulled?

Mr. MAURER: I think they switch the mine twice a day. I could not be positive on that.

Mr. DUNCAN: Is that all lake coal?

95 Mr. Maurer: No, sir, it includes all of the shipments for the day.

Mr. Hogsett: We desire to offer this report which the witness has just submitted, in evidence, and will ask to have it marked Exhibit Number 46.

And thereupon, the paper writing last above offered is admitted

in evidence on behalf of the complainant and is hereto attached marked Exhibit No. 46 and made part hereof.

Mr. Maurer: There are 29 cars of lake coal in that day's shipment?

Mr. Hogsett: Now go ahead with your answer.

Mr. Maurer: You refer to lake coal?

Mr. Hogsett: Yes.

Mr. Maurer: You understand that the lake coal referred to is lake coal that goes to Huron. It is consigned to the Glens Run Coal Company at Huron. If we have various grades of coal, we designate some of the office employés in whose name the coal is shipped. For example, if we were shipping mine run coal, we might call it S. B. Cooledge coal, or if we were shipping inch and a quarter lump, we might ship it to C. E. Sullivan in care of the Glens Run Coal Company, the name being for the purpose of designating the different grades of coal, and when we desire this coal loaded, we would notify the Wheeling & Lake Erie to load a certain vessel with C. E. Sullivan's coal, or Glens Run Coal or S. B. Cooledge coal, and that would simply indicate the grade of coal that was to be loaded on the vessel.

Commissioner Hughes: Can they be mixed?

Mr. Maurer: They can be mixed if we wanted to, but ordinarily we try to get a complete cargo on one grade of coal.

Mr. Hogsett: At the time this coal is shipped from the mine does any person know where the ultimate destination of that coal is beyond Huron?

Mr. Maurer: We do not.

Mr. Duncan: We object to that question, if the Commission pleases.

Commissioner Hughes: It is not a proper inquiry. He cannot know that.

Mr. Maurer: I certainly do know it.

Mr. Hogsett: He knows from the character of the shipments that no one can know where the ultimate destination of any car load or train load of this coal is.

96 Commissioner Hughes: That might be reached by a process of reasoning or by drawing a conclusion, but he should state his means of knowledge. You may ask the witness if he knows or is informed, but to ask him whether anybody knows, seems to me is going beyond the knowledge of the witness.

Mr. Hogsett: Is it known by you or anybody else where that coal will ultimately go from Huron?

Mr. Duncan: That question is still objectionable under the ruling of the Commission.

Mr. King: He might be asked as far as he knows.

Commissioner Hughes: The witness may state the facts.

Mr. Maurer: I can give the facts and the reasons why, if that is satisfactory.

Commissioner Hughes: State the facts and let the Commission draw the conclusion.

Mr. Duncan: The defendants' objection is based upon the further fact that the rate complained of is rate f. o. b. vessels, and the only proper subject of inquiry is as to coal sent to the lake to be put on

board vessels, and the ultimate destination of that cargo must be some place beyond the lakes. The gentlemen are bound by the tariff and they have no right to ship any coal other than that provided for by the tariff at a particular rate, and which is the rate involved in this proceeding. I simply want that in the record so that my objection may fully appear.

Question read.

Mr. Maurer: When the coal leaves the mine it is simply marked "lake coal" and is consigned to Huron. At the time of shipment we do not know what boat will take it or to what point it will go, or whether en route part of it may not be reconsigned for some other purpose, or whether part of the coal will be used for fueling boats. That is no distinct car moved to any particular place or to any particular ultimate destination.

Mr. Hogsett: Other than Huron?

Mr. Maurer: Other than Huron. I may say when a boat is loaded we do not designate what cars shall be loaded on the boat, but the railroad company goes out and picks up sufficient cars of that grade of coal to load the boat.

Commissioner Hughes: Is this coal all subject to reconsignment at any time after it leaves the mines; that is do you hold that right or power to reconsign the coal?

Mr. Maurer: The coal all belongs to the Glens Run Coal Company after it arrives at Huron.

97 Commissioner Hughes: And it is subject to reconsignment at any time.

Mr. Maurer: Subject to reconsignment.

Mr. Duncan: I do not think the witness understands the question of the Commissioner.

Mr. Maurer: I certainly do.

Mr. Hogsett: When you have gotten a boat to deliver a cargo of coal, you make a bill for that cargo, do you?

Mr. Maurer: Do you want the steps as we go along, the steps we take?

Mr. Hogsett: Just state the steps that you take.

Mr. Maurer: When we secure a boat for loading a cargo of coal the first step is to call up Mr. Titus, the assistant superintendent of the Wheeling and Lake Erie road and notify him that on a certain day a certain boat will be at Huron to load with Glens Run Coal, and simply request him to have the coal there to load the boat. That is all we have to do with the railroad company. Ordinarily we cover with the vessel people our contract tonnage. In other words, if we are figuring on shipping 150,000 tons of lake coal we will probably distribute that tonnage among three or four shipping concerns. For example, the United States Transportation Company, the Gilchrist Transportation Company, or some other transportation company covering that entire tonnage at a stated rate of freight to the different ports where we expect to ship. Then we notify these companies, whichever one we may select, that on a certain date we desire to load a cargo. They report to us the name of the vessel, if they have one.

Immediately upon the receipt of that report we fill out what we call a charter confirmation, giving the capacity and name of the vessel, where to load, and to what destination she is to go, the rate of freight and any other information that may be necessary, what kind of a vessel, where the vessel is to report for fuel, and whatever instruction may be necessary with reference to the vessel.

Mr. Duncan: What is that last statement about reporting for fuel?

Mr. Maurer: Whether she reports for fuel or not and where the vessel is to report for fuel.

Mr. Duncan: What fuel?

Mr. Maurer: Her own fuel.

And thereupon, blank form of charter confirmation is offered and admitted in evidence on behalf of the complainant and is hereto attached marked Exhibit No. 47 and made part hereof.

98 Mr. Hogsett: Right in that connection, Mr. Maurer, let me ask you whether or not there is any portion of that coal delivered to the purchasers f. o. b. vessel at Huron?

Mr. Maurer: Practically all delivered to the purchasers f. o. b. vessel at Huron, although you may make a price at the other end, but as far as our shipments are concerned, we nearly always make them f. o. b. Huron or Cleveland.

Mr. Hogsett: Then where is it delivered f. o. b. vessel at Huron, those orders are orders given to the vessel owners?

Mr. Maurer: Yes; we call it a charter confirmation.

Mr. Hogsett: You do that for the purchaser of your coal?

Mr. Maurer: Yes; we do that for the purchaser of the coal. We charter the boats. We sometimes agree in selling the coal that we will take care of the charter. That is ordinarily the case that we will take care of the furnishing of vessels and the chartering.

Mr. Hogsett: You mean by furnishing the vessel, making the arrangement with the vessel owner?

Mr. Maurer: Yes.

Mr. Hogsett: For the use of the vessel to ship the cargo in?

Mr. Maurer: Yes; to ship the cargo in.

Mr. Hogsett: Now, right at that point, is there any common arrangement or control between the Wheeling & Lake Erie and the vessels?

Mr. Duncan: We object to the question because it calls for a conclusion, and if the witness knows anything about it let him state the facts.

Commissioner Hughes: It is proper that he should state the facts.

Mr. Hogsett: What if anything does the rail shipment have to do with, or what connection has the rail shipment with the water movement?

Mr. Maurer: Absolutely none whatever.

Mr. Hogsett: What relation is there, if any, between the rail carrier and the water carrier?

Mr. Maurer: None whatever.

Mr. Hogsett: They are under a separate contract entirely?

Mr. Maurer: Yes.

Mr. Maurer: If the Commission will let me go on, I can explain the whole transaction. After the vessel is loaded sometimes the Wheeling & Lake Erie call up and notify us that the boat has cleared and has been loaded with so many tons of coal, but ordinarily we wait
99 until we get a report of this kind (producing same) from the dock superintendent at Huron showing the boat, the date she was loaded and the number of cars and the tonnage.

Mr. Duncan: Are you offering that in evidence?

Mr. Hogsett: We will offer it.

Mr. Maurer: Upon the receipt of that notice usually the first thing to do is to insure the cargo. Then we make out a bill of lading in this form (producing same) showing the destination, showing the name of the boat, showing the number of tons and the kind of coal, the rate of freight, consigned by ourselves as the consignor.

Mr. Hogsett: The lake freight, you mean?

Mr. Maurer: Yes; the lake freight. Then we mail this bill of lading to the consignee at Ashland to Duluth, as the case may be, mailing him two or three copies of the bill of lading, one of which he hands to the captain of the boat on his arrival there, and on that bill of lading the captain collects the freight. Sometimes that is done at the other end and sometimes at this end.

Commissioner Hughes: Is the coal that you land on the dock there always sold before you land it?

Mr. Maurer: No; it may be shipped and sold afterwards. When anybody wants a certain amount of coal we take it out of the bunch. There may be three or four or five hundred cars of coal there, and somebody calls up and says "we want five hundred of this" or "six hundred of that grade of coal."

Commissioner Hughes: That coal then is subject to reconsignment?

Mr. Maurer: Yes.

Commissioner Hughes: And may be sold after it is delivered on the dock.

Mr. Maurer: Part of it may be sold. Sometimes we have a bunch sold before hand.

Commissioner Hughes: But it is not necessarily sold before?

Mr. Maurer: Not necessarily sold.

Mr. Duncan: That is the practical situation though, isn't it? As a matter of fact you have most of it sold at the commencement of the season?

Mr. Hogsett: Do you want to cross-examine now?

A. I will wait a while for you if you do.

Mr. Duncan: Why are you so testy about it.

And thereupon, the blank form of bill of lading last above referred to is offered and admitted in evidence on behalf of the complainant and is hereto attached, marked Exhibit No. 47½ and made part hereof.

100 Mr. Hogsett: Mr. Maurer, you were saying something yesterday afternoon about insurance taken out on the cargo coal. Will you state to the Commission how that is done. Who takes it out and for whose account and benefit is it taken out?

Mr. Maurer: If the coal is sold F. O. B. vessel Huron we take it out for the consignee, for and on account of the consignee.

Commissioner Gothlan: When the tariff formerly read f. o. b. dock did the consignee then get a loading cargo?

Mr. Maurer: On some of the roads it is f. o. b. dock now.

Commissioner Gothlan: Who pays the loading charge, the shipper or the consignee?

Mr. Maurer: On the Pennsylvania road in Cleveland we pay the loading charge. Then at the end of the season all the charges of the dock company are turned over to Mr. Greist the auditor of the Pennsylvania Company, who goes over them and O. K.'s them, then the dock company relates to us whatever the difference is between the figures we pay and the figures Mr. Greist adopts. They run from probably $3\frac{3}{4}$ cents per ton up to 6 cents.

Commissioner Gothlan: That is when the rate reads f. o. b. docks?

Mr. Maurer: Yes. Some of those docks are leased by the railroad companies to other parties who operate the docks. And in a case of that kind we pay the dock companies and ordinarily the railroad company dictate how much they shall charge.

Mr. Duncan: That is, they reimburse the shippers what is presumed to be an equitable profit made out of the operation of the dock?

Mr. Maurer: Yes.

Mr. Duncan: So that the shippers should not be charged an exorbitant rate for unloading from the dock to the vessel?

Mr. Maurer: Yes, last year it averaged on the Pennsylvania below five cents per ton.

Mr. Hogsett: Now, Mr. Maurer, you may state whether or not you dispose or sell any of this coal after it has been taken to Huron?

Mr. Maurer: We dispose of a great deal of it after it has been taken to Huron.

Mr. Hogsett: Do you reconsign any of the coal either en route or after it gets there to other points than Huron, in Ohio?

Mr. Maurer: Never after the——

Mr. Hogsett: I mean do you divert it?

101 Mr. Maurer: I was answering the question. Never after it gets to Huron because in order to divert to other points on the Pennsylvania it would of necessity have to go back to Norwalk. But any coal that is on the siding prior to reaching Norwalk we frequently divert to other points.

Mr. Hogsett: You mean on the Wheeling & Lake Erie?

Mr. Maurer: Yes, sir.

Mr. Hogsett: You said on the Pennsylvania.

Mr. Maurer: I meant the Wheeling & Lake Erie. I said after it arrived at Huron it would of necessity have to go back to Norwalk to reach other points.

Mr. Hogsett: Do you know what the rate is to Kelley's Island?

Mr. Maurer: The vessel rate?

Mr. Hogsett: Yes, the vessel rate to Kelley's Island.

Mr. Maurer: I do not.

Mr. Hogsett: How about the vessel rates changing from time to time.

Mr. Maurer: Vessel rates practically change every season—I mean through the season they change.

Mr. Hogsett: Now take the coal shipped from the mines to Huron, your charge is how much; that is, your rate is how much?

Mr. Maurer: 90 cents f. o. b. vessel.

Mr. Hogsett: When it arrives at Huron and is delivered to the consignee—that is your company f. o. b. vessel, when with reference to that time do you pay the freights to the Wheeling and Lake Erie here for the rail haul?

Mr. Maurer: The Wheeling & Lake Erie usually render a bill about from the 10th to the 15th of the succeeding month. Their bills cover the statement of the coal loaded on each vessel; the car numbers and tonnage at 90 cents.

Mr. Hogsett: Now when the coal is taken from the mines and delivered at Huron and payment made, what if anything does the Wheeling & Lake Erie Railroad have to do with that coal after that time?

Mr. Maurer: Delivered on the boat to you, or to your order?

Mr. Maurer: Nothing whatever.

Mr. Hogsett: That transaction then, so far as the Wheeling & Lake Erie is concerned is closed?

Mr. Maurer: Absolutely closed.

Mr. Hogsett: Now what if anything has the Wheeling &
102 Lake Erie to do with the coal from the time it is shipped other than to take it to Huron and there deliver it on board the vessel or otherwise as you may direct?

Mr. Maurer: Nothing whatever.

Commissioner Gothlan: Where is your coal way billed from?

Mr. Maurer: Dillonvale.

Commissioner Gothlan: Have you ever seen a copy of your way bill?

Mr. Maurer: I do not believe I have. They make out their own way bills. On the Pennsylvania we make out the way bill and on the Wheeling & Lake Erie their agent makes out the way bill themselves. I find pinned to one of these papers a copy of their commercial way bill.

Commissioner Gothlan: You have not seen one of them yourself?

Mr. Maurer: No, sir.

Mr. Duncan: I had one but I found on looking for it yesterday I did not have it with me.

Mr. Hogsett: Then when the coal is delivered to you at Huron you there in some instances at least deliver it to the person or company to whom you make the sale of coal, who receives it; the person then receiving it on board the vessel.

Mr. Maurer: Yes.

Mr. Hogsett: And that is done under a separate contract—independent contract between the vessel carrier and the shipper whether it be yourself or the purchaser from you and to whom you deliver on board at Huron?

Mr. Duncan: We object to the form of the question, if the Commission please. Let the witness state the facts and the Commission can draw its own conclusion as to whether it is a separate arrangement.

Commissioner Hughes: The form of the question might be objectionable as suggesting the answers to the witness. Let the witness state the facts.

Mr. Maurer: I think I said yesterday that ordinarily we contract with the vessel owners, or the vessel shippers—I should say lake shippers for approximately our lake tonnage that we figure on shipping for the season. That sometimes does not cover the shipment and sometimes it is beyond the shipment. This is a contract entered into between the Glens Run Coal Company and the Transportation companies.

Mr. Duncan: Is that contract in writing?

Mr. Maurer: Yes, usually is. The form of the contract is in a letter. We write a letter to say that the United States Trans-
103 portation Company confirm what is a verbal arrangement showing the number of tons, the rate, and the rate to certain points on the lake, covering Milwaukee, Duluth, Ashland and possibly Canadian ports, and Port Huron, and I might add they reply to that letter accepting that much tonnage which constitutes ordinarily the contract our company makes for the lake carriage.

Mr. Hogsett: That is the way some of your coal is disposed of?

Mr. Maurer: Yes.

Mr. Hogsett: Some portion of it is sold during the season and delivered from the coal that you have accumulated or assembled at Huron?

Mr. Maurer: We estimate, as I said before, the tonnage. When I say tonnage that does not mean the tonnage we sell but the tonnage we figure we will be able to ship and be able to dispose of. This tonnage may not be over two thirds sold but we simply figure what we will probably sell and we have the coal; we cover sufficient coal to take care of that.

Mr. Hogsett: That is merely an estimate of what you may be able to sell during the season?

Mr. Maurer: Merely an estimate.

Mr. Hogsett: Then your shipments to Huron, the assembling point of your coal, is based upon what you estimate you may be able to dispose of during the season?

Mr. Maurer: Yes, sir.

Commissioner Gothlan: Going back for a minute, there is one point the commission is not clear on. I believe you stated you shipped to the port right along whether you have orders or not?

Mr. Maurer: We always keep a quantity of coal on the dock provided we have any lake shipments whatever.

Mr. Arnold: That is you have the cars on the dock?

Mr. Maurer: We keep the cars on dock or substantially on the dock; they are along the line of the railroad some place.

Commissioner Gothlan: Briefly what is the reason you ship that way instead of waiting until you have orders for the coal?

Mr. Maurer: In order to have the coal. It is a large quantity ordinarily that you sell at one time. For example a boat of ten thousand tons capacity—an order for ten thousand tons would require a boat of that capacity. To accumulate that much coal and take care of your business unless you had a very large mine would mean three or four weeks before you could accumulate it.

Commissioner Gothlan: You anticipate that?

104 Mr. Maurer: Yes, we anticipate that. And we ship that what we term our surplus coal. For example we are running to-day and we have ten cars left over and if we had no consignee in Ohio or other points that surplus would go to the lakes to await orders for shipment up the lakes. But you understand we have orders. We have a certain tonnage sold all the time.

Mr. Arnold: Still quite often such shipments were made when there are no sales for lake shipment at all?

Mr. Maurer: Yes. Simply to get rid of the coal, without the sign of an order.

(Here follows Exhibit No. 46, marked page 104½.)

EXHIBIT NO. 46. The Glen's Run Coal Company. Edgar - 1 & 2 Mine.
Statement of Coal Loaded and Shipped May 27th, 1909.

Order No.	Car Initial	No.	Weight	Size	Consignee	Destination.	Route	Account of	Freight prepaid.
	W & L E.	41774	80,000	1-4	Canton Pressed Brick Co.	Canton, O.		Consignee	
	"	4059	54,200	"	W. & L. E. R.	Columbia, Ohio.			
	"	41272	53,400	"	W. & L. E. R. R.	Navarre, Ohio.			
	"	10902	53,700	"	W. & L. E. R. R.	Navarre, Ohio.			
	"	39065	87,400	"	The Glen's Run Coal Co.	Huron, Ohio.			
	"	31836	53,900	"	The Glen's Run Coal Co				
	"	40925	54,700	"	The Glen's Run Coal Co				
	"	9036	53,900	"	The Glen's Run Coal Co.				
	"	40067	54,800	"	The Glen's Run Coal Co.				
	"	8544	52,400	"	The Glen's Run Coal Co.				
	"	40148	54,000	"	The Glen's Run Coal Co				
	"	40230	53,400	"	The Glen's Run Coal Co.				
	"	41503	53,500	"	The Glen's Run Coal Co.				
	"	42069	76,200	"	The Glen's Run Coal Co.				
	"	9311	53,300	"	The Glen's Run Coal Co				
	"	41208	53,200	"	The Glen's Run Coal Co				
	"	41828	54,900	"	The Glen's Run Coal Co.				
	"	10551	72,200	"	The Glen's Run Coal Co.				
	"	11035	53,000	"	The Glen's Run Coal Co.				
	"	11532	53,600	"	The Glen's Run Coal Co				
	"	41130	53,300	"	The Glen's Run Coal Co.				
	"	41792	54,500	"	The Glen's Run Coal Co.				
	"	10767	54,700	"	The Glen's Run Coal Co.				
	"	8598	54,300	"	The Glen's Run Coal Co.				
	"	9090	54,500	"	The Glen's Run Coal Co.				
	"	8747	53,600	"	The Glen's Run Coal Co.				
	"	9589	52,900	"	The Glen's Run Coal Co.				
	"	41875	58,800	"	The Glen's Run Coal Co.				
	"	42475	87,600	"	The Glen's Run Coal Co.				
	"	50139	87,400	"	The Glen's Run Coal Co.				
	"	47841	87,300	"	The Glen's Run Coal Co.				
	"	50252	89,500	3-4	Carnegie Steel Co.	Mingo Jn. Ohio			
	"	47477	85,600	"	Carnegie Steel Co.	Mingo Jn. Ohio			
	"	43429	85,350	"	Carnegie Steel Co.	Mingo Jn. Ohio			
	W. S. B.	4902	97,000	"	Carnegie Steel Co.	Mingo Jn. Ohio			
	W & L E	80321	53,900	3-4	W. & L. E. R. R. Co.	Columbia, Ohio.			
	"	50015	54,000	"	W. & L. E. R. R. Co.	Columbia, Ohio.			
	"	41921	87,900	R of M	Colgate Hoyt & Dalzell		M. C. R. R.		
	"	47524	87,600	R of M	National Tube Co.	Lorain Ohio.			
	"	50429	87,600	"	National Tube Co.				
	"	50393	88,100	"	National Tube Co.				
	"	43208	84,200	Slack	National Tube Co.				
	"	50521	83,400	"	National Tube Co.				
	"	50429	82,800	"	National Tube Co.				
	"	50008	83,700	"	National Tube Co.				
	"	47750	81,900	"	National Tube Co.				
	"	50102	83,700	"	National Tube Co.				
	"	47474	83,500	"	National Tube Co.				
	"	41595	80,000	Cop					
				pera					
				[illegible] Co.		Cleveland, Ohio.			

105 EXHIBIT No. 47.

Charter Confirmation.
Office of The Glens Run Coal Co., Rockefeller Building.

No.....
.....
.....

CLEVELAND, O. .....

Confirming our charter made this day, you are to place the ..... capacity ..... tons to load .....for account..... with soft coal at.....for..... Vessels to report.....Steamer to fuel with ..... coal ..... Rate of freight ..... Remarks .....

THE GLENS RUN COAL COMPANY,
By .....

EXHIBIT No. 47½.

No.....

OHIO, ..., 190..

Shipped by The Glens Run Coal Co. in good order and condition, on board the ....., the following articles, marked and consigned as per margin to be delivered in like order and condition (the dangers of navigation only excepted), as addressed on the margin, subject to freight and charges as below.

In Witness Whereof, the Master of said vessel hath signed ..... Bills of Lading of this tenor and date.

Tons Coal

Freight per ton, free in and out to vessel.

Mr. OSBORNE, a Number Eight Ohio Operator called as a witness by the complainant:

Mr. Hogsett: State to the Commission how that is done?

Mr. Osborne: For the sake of handling our coal with the least possible trouble and expense to the railroad, we take some of our office men and while—we perhaps do it a little different from some of the rest, because we ship a great deal of Pennsylvania coal and other Ohio coals to the lake front, and we will take one man, if you please, and consign him to a certain port—take Lorain. We will send, say S. H. Robbins, who will take all of those grades
106 of coal consigned to that point. He will take lump, run of mine, nut or slack, which ever it may be. When we order the boats we will order—give notice to the railroad that, for instance the Hiawatha will be for loading about such a date. Sometimes it is a little shorter than that time and sometimes it

overruns—depends upon the speed of the unloading of the boat; and tell them that S. H. Robbins for three-quarter, and they will get that coal ready—giving them sufficient time to run it down to the docks, so that they can handle the coal at the best possible operation for them and the least delay to the boat possible.

Mr. Hogsett: Prior to the loading of that boat, the coal from the various mines is assembled at these lake ports. There subject to sale and subject to such disposition and shipment as the coal company and coal operators may desire.

Mr. Duncan: We object to the form of the question as leading.

Commissioner Hughes: The question, of course, is leading.

Mr. Hogsett: Well, the only object- to a leading question is when you have a willing witness.

Mr. Hogsett: State those conditions.

Mr. Osborne: We take our coal—in the first place we fill up our mines with orders that we may have to deliver—of rail orders. Then the surplus of those different grades of coal we may order to the lake front and it is just about on the same line as pouring in from four or five different mines, different streams into a tub, and then, as we want a cargo of coal, we take an order out of that tub—a dipper full of whatever we want for the boat and the freight we pay to the lake front, and the vessel arrangements we make either by direct contract with the vessel concerned or we take a chance—what I mean by a chance, we keep out a certain percentage of our coal that is not contracted with any boat line and then we utilize a spot boat. For instance, that tub is getting full. The Railroad company is going to shut off that coal running in there. So if we can get a spot boat, we rush it out and dip it out and let it go on.

Mr. Hogsett: When this coal is shipped from the mines it is consigned, as you have stated, to some person in the employ of your company?

Mr. Osborne: Be consigned to one of our employés with the understanding *that* the railroad company that it is our coal when we pay the freight.

107 Mr. Hogsett: At the time it is shipped from the mines does your company know where any particular car load or train load of coal will finally go?

Mr. Osborne: Absolutely no; absolutely not. Unless it would be some time that there was a boat at the dock and a shortage of coal, then we would be after the railroad to rush that coal; that is a very exceptional case now because there is plenty of coal at the lake front.

Mr. Hogsett: This coal is delivered to the purchaser, your purchaser, where, usually?

Mr. Osborne: When we purchase coal?

Mr. Hogsett: No, to the purchaser.

Mr. Osborne: Well, we do that anyway the fellow will take it; give him any kind of medicine he wants on it. The coal is sold very largely f. o. b. boat at the lake front and that is all the basic price is, your coal f. o. b. at the lake front. Sometimes we will sell

a man a block of coal at the lake front and he will request us to take a charter. We will take a chance on it or we may contract his coal.

Mr. Hogsett: Does it ever occur that your company purchases from another company coal that it has assembled or accumulated at the lake front, either Huron or Cleveland or those other ports?

Mr. Osborne: Yes, we have purchased coal at the lake front—purchased from different roads, among them the Wheeling & Lake Erie. I think we purchased some this spring from the Wheeling & Lake Erie at the lake front, number eight field coal.

Mr. Hogsett: That is you mean you purchased from the Wheeling and Lake Erie shippers?

Mr. Osborne: Yes, sir; Wheeling & Lake Erie road shippers.

Mr. Hogsett: Not purchased from the Wheeling & Lake Erie Railroad Company?

Mr. Osborne: No, sir.

(1268-1271.)

Mr. Hogsett: Now you said something about purchasing coal from Wheeling shippers?

Mr. Osborne: Yes, sir.

Mr. Hogsett: Was that coal that had been shipped to the lake port?

Mr. Osborne: That had been shipped to the lake port?

Mr. Hogsett: Had it been sold when it was shipped?

Mr. Osborne: No, sir; they solicited us to take it and we bought it at a very cheap price, an inducement to move it.

108 Mr. Hogsett: How much was there of that, Mr. Osborne, do you remember now?

Mr. Osborne: My recollection when they called up they had about five thousand tons and we told them if they would increase the cargo up to the point that we could get a boat for it, I think in the neighborhood of six to seven thousand tons, we would take it.

Mr. Hogsett: Now, Mr. Osborne in the shipments of this coal from the mines and in the shipments subsequently made by boat I will ask you to state whether or not there is any connection at all between the rail carriage and the water carriage?

Mr. Duncan: I object to the form of the question, particularly in view of the fact that the witness has already stated the circumstances and conditions under which this coal moves from the No. 8 field to the northwest.

Commissioner Hughes: If the witness is qualified to answer he may answer. There might be some objection to the form of the question but the witness may answer.

And, thereupon the Commission overruled the above objection of the defendants to which ruling of the Commission the defendant excepted.

Mr. Osborne: There is no connection whatever. It is absolutely our coal. We pay the freight rates, the lake freight and make our own vessel arrangement and everything.

Mr. Duncan: I move that the first part of the answer "there is absolutely no connection" be stricken out.

Commissioner Hughes: The answer may remain in the record.

Mr. Duncan: Note an exception.

(1289-1291.)

Mr. Duncan: Now what you say that you do not know where the coal is to go that comes from the mine you mean you do not know to what point in the northwest each particular car of coal that is sent up to this bucket or tub at the lakes is to go?

Mr. Osborne: Either that or train load.

Mr. Duncan: Or train loads?

Mr. Osborne: Yes, sir.

Mr. Duncan: But you are pouring it all into the tub?

Mr. Osborne: Sure.

Mr. Duncan: To be taken out?

Mr. Osborne: Yes.

Mr. Duncan: And distributed in the northwest?

Mr. Osborne: To be taken to our dock or some other places on some other order that may come in.

109 Mr. Duncan: It does not of necessity go to the northwest does it?

Mr. Osborne: No, no.

Mr. Duncan: Well all of the coal that goes in there that takes the lake rate goes to the northwest, doesn't it?

Mr. Osborne: No, some of it goes to Detroit, some up along the river; some over into Canada—wherever we can get an order. Some of it we divert and we use locally.

Mr. Duncan: You pay the local rate if you divert it?

Mr. Osborne: Yes and take your demurrage charges too.

Mr. Arnold: Go to the Islands in Lake Erie——

Mr. Osborne: No—Kelly's Island you mean?

Mr. Arnold: Yes.

Mr. Osborne: I have none of that order.

Mr. Arnold: If any of that coal was sent from Huron to Kelly's Island it would take the same lake rate?

Mr. Osborne: Sure if it would go into the river and be sunk it would take the same rate.

Mr. Arnold: I mean for shipping from lake ports to other points in Ohio it would still take the lake rate?

Mr. Osborne: Yes any point in Ohio.

Mr. Arnold: That is all.

(1306-1307.)

B. A. Worthington, Receiver of Wheeling & Lake Erie Railroad.

Mr. Hogsett: Mr. Worthington, has the Wheeling & Lake Erie Railroad Company, or you, as Receiver of that Company any contract or arrangement for the transportation of this lake coal with any lake carrier?

Mr. Duncan: I object to the question as incompetent, irrelevant and immaterial.

Commissioner Hughes: The witness may answer the question.

Mr. Duncan: I object upon the further ground that the question is objectionable as to form in that it assumes the existence of a contract.

And thereupon the Commission overruled the above objection of the defendants, to which ruling of the Commission the defendants excepted.

Mr. Worthington: No contract excepting the tariff rate of ninety cents F. O. B. vessel.

Mr. Hogsett: Is that with the lake carriers?

Mr. Worthington: No, that is with the shipper. The shipper furnishes the boat into which we load the coal.

Mr. Hogsett: I am asking you whether or not you have any contract with the lake carrier?

110 Mr. Duncan: I object to that question. The witness certainly cannot characterize the arrangement.

Mr. Hogsett: If there is no arrangement he can say so.

Mr. Duncan: He says none as evidenced by the tariff.

And thereupon the Commission overruled the above objection of the defendants, to which ruling of the Commission the defendants excepted.

Question read.

Mr. Worthington: Not that I know of.

Mr. Hogsett: Well, you are in the management and control of the property and you know what the contracts are, don't you?

Mr. Worthington: No; the shipper furnishes the boat and the shipper makes his own arrangements for shipping coal by vessel to the lake and our tariff is ninety cents F. O. B. vessel, and when he give us instructions, we load the coal onto the boat and he charters the boat or makes his own arrangements for shipping the coal up to the head of the lakes.

Mr. Hogsett. There is no arrangement between your railroad and the lake carrier?

Mr. Worthington: Not directly.

Mr. Duncan: I object to the form of the gentleman's question. I do not know whether he means a direct arrangement or an indirect arrangement.

Mr. Worthington: No direct arrangement.

Mr. Hogsett: What do you mean by "no direct arrangement"?

Mr. Worthington: Well, if the fact that the shipper furnishes the boat and arrangements to contract for the boat is not an indirect arrangement, why we have no arrangement.

Cross-examination by Mr. DUNCAN:

Mr. Duncan: The rate F. O. B. Vessel requires the shipper to furnish the vessel?

Mr. Worthington: Yes, sir.

Mr. TITUS, Assistant Superintendent Wheeling & Lake Erie Railroad.

Mr. Maurer: In 1907 there was a demurrage charge, wasn't there, and in 1908?

Mr. Titus: No; in 1907 there was a so-called demurrage charge, yes.

Mr. Maurer: While you are on that subject, you may state what that was.

Mr. Titus: It was an average of seven days. The amount of coal we were loading at that time, with an average of seven days,
111 we would have had about 6,000 cars of Lake coal.

Mr. Maurer: Explain what the seven days' demurrage was, so that the Commission may understand it?

Mr. Titus: Well, the average was seven days.

Mr. Maurer: The average of what; explain it so that the Commission will understand it.

Mr. Titus: To make it short, if you loaded two hundred cars on a boat, some of those cars might have been delayed thirty days, and some of them twenty, and some of them five, and the average of those two hundred cars was not to be over seven days; otherwise there was a demurrage.

Mr. Maurer: That is, if you brought two hundred cars to the lake, and one hundred of them were loaded at the end of fourteen days and the other hundred got there the day they were loaded, there would be no demurrage?

Mr. Titus: None whatever.

Mr. Maurer: That made the average of seven days?

Mr. Titus: Yes.

Mr. Maurer: What was the charge per car, Mr. Titus?

Mr. Titus: One dollar a day.

Mr. Maurer: And that one dollar was extra, beyond the rate?

Mr. Titus: Yes.

Mr. Maurer: For every day?

Mr. Titus: Yes.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling and Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO et al., Defendants.

Certificate.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, B. C. Miller, Clerk of the Circuit Court of the United States within and for said district, do hereby certify that the foregoing is a

full, true and complete transcript of the testimony in the above entitled cause, taken before and written out by me, in open court, under the 67th rule in equity, as amended, and pursuant to the order of the court.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court, at the City of Cleveland, in said district this 25th day of June A. D. 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER, *Clerk.*

112 UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, Robert W. Tayler, United States District Judge within and for said district, sitting in the Circuit Court, do hereby certify that the foregoing is all the testimony taken in open court on the hearing of the above entitled cause before me, written out by B. C. Miller, Clerk, and ordered to be made a part of the record in said cause.

ROBERT W. TAYLOR, *Judge.*

(Endorsement:) No. 7961. B. A. Worthington, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. Testimony. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO et al., Defendants.

Opinion.

TAYLER, *J.:*

The complainant brings this action against the Railroad Commission of Ohio, the Pittsburgh Vein Operators' Association of Ohio, its officers and members, and attacks the validity of an order made by the Railroad Commission, upon complaint of the Operators' Association, finding the complainant's rate on coal from the No. 8 District of Ohio, to Huron and Cleveland, Ohio, f. o. b. vessel (known as "lake-cargo coal"), to be unreasonable and unjust, and fixing a rate of seventy cents f. o. b. vessel as the maximum rate to be charged by the complainant for the statutory period provided by the Ohio Railroad Commission Act. The order was served upon the complainant the 23rd day of March, 1910, and, under the provisions of section 14 of said act (R. S. 244-24-) takes effect and becomes operative of its own force within thirty days after service thereof, but through counsel

representing the Railroad Commission it was agreed that no action should be taken under the order pending a decision by this court.

The matter is now before this court on a motion for a temporary injunction. So much of the evidence given before the Railroad Commission as is pertinent on the question involved is, by agreement, to be considered as though presented by affidavits on this hear-
113 ing.

The questions presented and argued, although there are other grounds for relief set forth in the bill of complaint, arise on the claim of the complainant that the lake-cargo coal rate is an inter-state rate, and that the Railroad Commission of Ohio is without jurisdiction to make the order referred to.

It appears that bituminous coal, such as is mined in the No. 8 District, is classified by the complainant, for tariff purposes, as (*a*) railway fuel, being coal sold to railroad companies; (*b*) lake-cargo coal, that is, coal intended for shipment by lake to points in the Northwest; and (*c*) commercial coal, comprising coal for commercial and domestic use, not included in the first two classes.

The No. 8 Coal District of Ohio is situated in Jefferson, Harrison and Belmont Counties, and the members of the Pittsburg Vein Operators' Association of Ohio are interested in mining coal in that district. The traffic is large, about 400,000 tons of lake-cargo coal being shipped over the complainant's railroad from that district in 1909, and trans-shipped by vessel to points in the Northwest.

At and prior to the time of the complaint being lodged with the Railroad Commission by the Operators' Association, the tariff rate in force on the complainant's railroad on lake-cargo coal from the No. 8 District to Huron and Cleveland, Ohio, f. o. b. vessel, was ninety cents per ton. The rate covers, in addition to the rail transportation, the service of unloading the coal from the cars into vessels and trimming it in the holds of the vessels, so that they can safely proceed.

The rate on commercial coal to Huron or Cleveland is $1.00 per ton.

The vessels for lake-cargo coal are generally furnished by the operators, but the coal is sometimes sold f. o. b. vessel, the title to the coal in that case passing to the purchaser upon being properly loaded into the vessel.

The coal in question is shipped from the mines to Huron or Cleveland, principally Huron, where the complainant has large dock facilities and expensive machinery and appliances for unloading coal into vessels, during the season of navigation, simply marked "Lake coal" consigned to the operator, or to some office employé whose name is used as a mere matter of convenience for the purpose of designating a particular grade of coal. The operator notifies the railroad that at a certain time a vessel will be at Huron to load so many tons of a particular grade of coal. The railroad then picks up such cars of the operator's coal as are necessary to fill the cargo and moves them on to the dock alongside of the vessel, loads the vessel, trims
114 or distributes the coal properly in her hold, and furnishes the shipper with a cargo statement showing the car numbers and

weights and total tons of coal in the vessel, on which information the bill of lading for the vessel shipment is made out.

It appears that all the coal shipped at the lake-cargo rate remains on the cars of the complainant until unloaded into a vessel, unless it should be diverted en route and devoted to some other purpose, but in that case the lake-cargo rate does not apply. For instance, if it should be diverted to commercial use at Huron, the rate on commercial coal, which is $1.00 a ton, would govern.

There is testimony to the effect that when the coal leaves the mines it is not known in what vessel it will be loaded nor to what particular ultimate destination it will go, and that sometimes such coal is sold and vessels arranged for after the coal is at Huron, but it is subject to demurrage charge if it remains on the cars beyond a specified time.

All coal thus loaded in vessels is, and must practically be, carried to points in other States—or to Canada. The lake ports in Ohio receive coal by rail from interior points, but not by boat from other Ohio ports. It might be that a quantity of coal, so small as to be negligible, is unloaded on one of the Ohio islands in Lake Erie, but no substantial importance is claimed for this circumstance nor could be given to it.

The complainant claims:

1. That the rate in question is applicable only to coal moving in interstate commerce from mines in the No. 8 District to points outside of the State of Ohio, via lower lake ports and then by vessel up the Great Lakes.

2. That it is the well understood intention of all the parties, the complainant, the operator and the vessel carrier, to engage in interstate commerce; that the lake-cargo rate is not applicable where the total is not sent by vessel to points outside of the State of Ohio, and that it is a "proportional rate," made for the purpose of allowing the operators of the No. 8 District to secure, in effect, a lower through rate.

3. That the contract between the operator and the complainant is not completed until the railroad has loaded and trimmed the vessel, and that, when loaded, the vessel must naturally take the coal to some point outside of the State of Ohio, and that such loading and trimming is, therefore, a part of the interstate commerce engaged in by the vessel owner, the coal operator and the complainant in the transportation of lake-cargo coal; and that, even if the coal
115 does change title upon delivery f. o. b. vessel, it has already started on its interstate journey.

4. That while lake-cargo coal may be reconsigned or diverted to other purposes, when that is done the coal loses its character as lake-cargo coal and becomes subject to a new contract with a different rate, and that such incident can have no effect in determining the character of the original shipment.

The defendants contend:

1. That the carriage contracted for between the operator and the complainant is one that begins and ends in Ohio; that the coal is mined and loaded on cars in Ohio and is delivered on board a vessel in Ohio, and that, therefore, the shipment is an intrastate one.

2. That there is no disclosed intention to engage in inter-state commerce, as, when the coal leaves the mine, it is known what boat will take it or to what point it will go, whether it will be delivered en route, or interchanged with other operators at Huron, and that some of the coal shipped from the mines at the lake-cargo rate is in fact ultimately delivered to points in the State of Ohio.

3. That no arrangement of any kind as to the through rate exists between the rail carrier and the vessel carrier, and that the contract with the complainant is ended and complete when the coal is loaded on and trimmed in the vessel and is independent of and has nothing to do with the contract with the vessel carrier, which may be made by either the operator or the purchaser of the coal.

4. That the Inter-state Commerce Commission has no jurisdiction of the rate for the traffic in question because there is no "common control, management or arrangement for a continuous carriage or shipment" between the rail carrier and the water carrier.

It seems to me that a consideration of the facts can lead to no other conviction than that this lake-cargo coal has, when started on its journey, taken on the character of inter-state commerce; the rate itself is fixed as an inter-state rate; it is ninety cents only if and because there is to be a further transportation into another State at a rate which is fixed in consequence of a rate which the complainant charges.

The complainant receives the ninety cents for (*a*) carrying the coal to the lake (*b*) loading in or a vessel which intends to, and must practically, carry the coal to some Northwestern port, and (*c*) trimming the coal in the hold so that it will carry safely.

The loading and trimming are done for no other purpose than to contribute that much to the transportation to another State;
116 in the sense of commerce as it is and must be carried on, it is mere sophistry to say that it might be unloaded at some other Ohio port; business could not be done as business, and is not done, in that way. But even if it were so done, it would immediately lose its character as lake-cargo coal and become subject to the rate on commercial coal, namely, $1.00.

It is insisted that, with respect to this coal, there is no common control, management or arrangement for a continuous carriage or shipment between the rail carrier and the water carrier, as provided in the Inter-state Commerce Act, and that without this there can be no interstate character given to the coal. As to this the answer is that when the railroad agrees to haul and load for ninety cents, as against a higher rate when not destined to another state, there is made, in effect, an arrangement between the rail carrier and the water carrier. It is not made with some particular water carrier, but it is made with whatever water carrier the operator arranges with to take the cargo. The ninety-cent rate does not become effective except in connection with some rate which is made by a water carrier, for it is not lake-cargo coal unless loaded on a vessel and carried to a Northwestern port by the lake carrier.

The fact that it is a "proportional rate" of a longer haul rate both

characterizes the rate and the business and also implies the arrangement to which the statute refers.

The situation would, I think, be more easily defined if we were discussing the question as to whether the railroad company had a right to deny the jurisdiction of the Interstate Commerce Commission to deal with the rate and was insisting that it was subject only to regulation by the State. The device of giving a rate on coal through to the hold of a vessel, which could necessarily carry it only to another State, when it had a higher rate if left at the port and was not loaded on a vessel, would properly be said to be a mere subterfuge.

The claim that the mere purpose of the shipper or of others to ship it beyond the limits of the State does not make it interstate commerce is true, and the argument would be sound in this case if the rate was the same as on other coal and it was unloaded on the dock at Huron or Cleveland. But this case is radically and characteristically different from that; the intention and the rate and the physical condition and position into which the railroad places the coal all concur in giving an interstate quality to the commerce.

Why does the railroad company make a rate for lake-
117 cargo coal less than the rate to the same port? It can only be because there is to be an additional haul of that coal. It cannot be legally justified on any other theory. It would be unlawful, in view of the rate on "commercial" coal, to give a ninety-cent rate on board a vessel if the journey that that coal was to take was then completed.

But, as I have before said, not only does it mean that there is to be an additional transportation of that particular coal, but in case of coal delivered at Lake Erie ports on board vessels, it means necessarily transportation to a port in another State, and it is that which gives an interstate character to the coal which is under consideration and to the rate which is being discussed.

When we analyze and determine the real nature of the controversy between the complainant on the one hand and the State Railroad Commission and the operators on the other, we discover that the fact that lake-cargo coal has essentially passed into interstate commerce and that the ninety-cent rate is an interstate rate is the sole foundation of the contention of the operators and of the finding of the Commission that the rate ought to be reduced to seventy cents. They undertake to prove that the ninety-cent rate is excessive by showing the cost of transporting the cargo to the Northwestern lake ports and the expense of handling it there.

I find no reason to change my opinion as to the nature of this commerce and of this rate by a consideration of the cases cited by counsel for the Commission. Conclusive weight is sought to be given to Gulf, etc., Ry. Co., vs. State of Texas, 204 U. S. 403. The Supreme Court in that case carefully applied the sound rules of law to the facts which were there presented, and I see nothing in any declaration of the court there made which would tend to deny the soundness of the proposition that in this case lake-cargo coal, on which a rate of freight is fixed because it is lake-cargo coal, is to be dealt with as interstate commerce.

I, therefore, conclude that the Railroad Commission of Ohio has no authority to fix a rate at which lake-cargo coal, as defined in the present practice of railroad companies, should be carried, but that it is subject only to the authority of the Interstate Commerce Commission.

R. W. TAYLER.

May 31, 1910.

(Endorsement:) No. 7961. United States Circuit Court, Northern District of Ohio, Eastern Division. B. A. Worthington Receiver of The Wheeling & Lake Erie Railroad Company Complainant vs. Railroad Commission of Ohio et al., Defendants.
118 Opinion. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Final Decree.)

April Term, A. D. 1910, to-wit: June 25, 1910.

Present: Honorable Robert W. Tayler, U. S. District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company.

vs.

RAILROAD COMMISSION OF OHIO et al.

This cause came on to be heard upon the bill of complaint of the complainant, the answer of the Railroad Commission of Ohio, defendant, the replication of the complainant, and the testimony offered by the parties in support of their respective claims respecting the character of the commerce to which the lake cargo rate is applicable, and the court ordered the testimony to be taken in open court and reduced to writing by the clerk and made a part of the record which is accordingly done; and thereupon it was argued by counsel, and the court after due consideration and being fully advised in the premises finds with the complainant on the issues joined with reference to the character of such commerce and that the allegations of the bill of complaint respecting the character of the commerce to which the lake cargo rate is applicable are true, that the lake cargo rate involved in this controversy applies only to coal transported from a point in the State of Ohio, to wit, the No. 8 District, to a point outside the State, and that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged by the complainant for the services rendered by said complainant in the transportation of said lake cargo coal:

Wherefore, it is Ordered, Adjudged and Decreed—

(1) That the order of the Railroad Commission of Ohio made and entered the 28th day of February, 1910, in proceeding pending before it wherein the Pittsburg Vein Operators Association of

Ohio was complainant and The Wheeling & Lake Erie Railroad Company and B. A. Worthington, its Receiver, were defendants, and which said order is set forth in the bill of complaint and which purports to require The Wheeling & Lake Erie Railroad Company and B. A. Worthington, its Receiver, to fix a rate of 70 cents per ton, F. O. B. vessels, on lake cargo coal from No. 8 District in Ohio to lake ports Cleveland and Huron, be, and the same is hereby void and of no effect.

119 (2) That the Railroad Commission of Ohio, its agents, attorneys, representatives and members be, and they and each of them are hereby perpetually enjoined and prohibited from instituting, authorizing or directing any suit, action or actions of either a civil or criminal nature or any proceedings against B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, or The Wheeling & Lake Erie Railroad Company, the object or purpose of which, or relief sought by such action being to put into effect or enforce any of the provisions of said order of the Railroad Commission of Ohio made the 28th day of February, 1910, respecting the rate on lake cargo coal or to subject the said B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, or The Wheeling & Lake Erie Railroad Company to any penalties for forfeitures for any failure to comply with said order under the statutes of Ohio made and provided, or from in any manner interfering directly or indirectly with the continuation of the present rate on the lake cargo coal from the No. 8 mines in Ohio to said lake ports at the present time in effect on the railroad operated by B. A. Worthington, as Receiver of The Wheeling & Lake Erie Railroad Company, or such other rate or rates as the said Receiver may from time to time put into effect.

The court in view of the foregoing finding and decree does not deem it necessary and has therefore given no consideration to the other matters set forth in the bill of complaint of the complainant and upon which the complainant further predicates his right to the relief prayed for, and which said other matters have been traversed in the answer of the Railroad Commission of Ohio, the finding and decree of the court in the present instance being based solely upon the fact that the commerce to which the rate applies is interstate commerce over which the Railroad Commission of Ohio has no power or authority.

To which finding, judgement, order and decree, the defendant Railroad Commission of Ohio excepts, and on application of defendant an appeal is allowed in open court. The appeal bond is fixed at $250.00.

(Petition for Appeal.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, Defendant.

120 Petition for Appeal.

The defendant herein, the Railroad Commission of Ohio, feeling itself aggrieved by the final decree heretofore made and entered on the 25 day of June, 1910, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers, upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

RAILROAD COMMISSION OF OHIO,
By U. G. DENMAN,
Attorney General of the State of Ohio,
Attorney for Defendant.

FREMAN T. EAGLESON,
T. H. HOGSETT,
Of Counsel.

Dated June 25, 1910.

(Endorsement.) No. 7961. B. A. Worthington, Receiver, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. In Equity. Petition for Appeal. Filed June 25, 1910. B. C. Miller, Clerk. M. B. & H. H. Johnson, Cleveland, Ohio.

(Assignment of Errors.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO, Defendant.

Assignment of Errors.

Comes now the defendant, the Railroad Commission of Ohio and files the following assignment of errors, upon which it will rely upon its prosecution of its appeal from the decree made by this Honorable Court on the 25 day of June, 1910, in the above entitled cause, and says; that the findings and decree in said cause are erroneous and against the just rights of said defendant for the following reasons:

1. That the court erred in its finding for the plaintiff on the issue joined with reference to the character of the commerce to which said lake cargo rate is applicable.

121 2. That the court erred in its finding that the lake cargo involved in this controversy applied only to coal transported from a point in the State of Ohio, to-wit: the Number Eight District to a point outside the state.

3. The court erred in finding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged by the complainant for the services rendered by said complainant in the transportation of said lake cargo coal.

4. Said court erred in not finding and holding, upon a consideration of all the evidence, that the movement or transportation of said Number Eight Lake coal from said mines in said Counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to said City of Cleveland and to said village of Huron, both in the State of Ohio, was an intra-state movement, and therefore, within the jurisdiction of the Railroad Commission of Ohio.

5. The Court erred in ordering, adjudging and decreeing that said order of the Railroad Commission of Ohio made and entered on the 28th day of February, 1910, is void and of no effect.

6. Said court erred in enjoining and prohibiting the defendant Railroad Commission of Ohio from instituting, authorizing and directing any suit, action or actions for the purpose of putting its said order of February 28th, 1910, into effect or from enforcing the provisions of said order.

7. That said court erred in granting the prayer of the complainant in said suit and entering a final decree therein against this defendant.

Wherefore, said defendant prays that the finding, order judgment and decree of said court against it may be reversed, and that said court may be directed and ordered to enter a decree dismissing the complaint of complainant herein.

U. G. DENMAN,
Attorney-General of the State of Ohio,
Attorney for Defendant.

FREEMAN T. EAGLESON,
THOMAS H. HOGSETT,
Of Counsel.

(Endorsement:) No. 7961. B. A. Worthington, Receiver, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. Assignment of Errors. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. M. B. & H. H. Johnson, Cleveland, Ohio.

(Precipe.)

122 In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO, Defendant.

Precipe.

To the Clerk of Said Court:

Please prepare a transcript of the record in the above entitled cause for the United States Circuit Court of Appeals for the Sixth Circuit, and include therein all the pleadings and papers filed, testimony taken and orders entered in said case.

U. G. DENMAN,
Attorney-General of the State of Ohio,
Attorney for Defendant.

THOS. H. HOGSETT,
FREEMAN T. EAGLESON,
Of Counsel.

(Endorsement:) No. 7961. B. A. Worthington, Receiver, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. In Equity. Precipe. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. M. B. & H. H. Johnson, Cleveland, Ohio.

(Bond.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO, Defendant.

Appeal Bond.

Know All Men by These Presents, That we, the Railroad Commission of Ohio, as principal, and American Bonding Company, of Baltimore as surety, are held and firmly bound unto B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company his certain attorneys, successors or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly
123 and severally by these presents. Sealed with our seals and dated this 25th day of June, in the year of our Lord One thousand Nine hundred and Ten.

Whereas, lately at a session of the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio in a suit pending in said court between B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, complainant, and the Railroad Commission of Ohio, defendant, a decree was rendered against the said Railroad Commission of Ohio, and the said Railroad Commission of Ohio having been allowed an appeal in open court and filed a copy thereof in the office of the clerk of said court to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such that if the said Railroad Commission of Ohio shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

AMERICAN BONDING COMPANY OF BALTIMORE, *Surety*.
[SEAL.] By C. K. LAWRENCE, *Attorney in Fact*.

Sealed and delivered in the presence of

——— ———.
——— ———.

Approved by

R. W. TAYLER, *Judge*.

(Endorsement:) No. 7961. B. A. Worthington, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. In Equity. Appeal Bond. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. M. B. & H. H. Johnson, Cleveland, Ohio.

(Certificate of Clerk.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO, Defendant.

124 NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the Circuit Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and complete copy of the record, including the petition for allowance of appeal, assignment of errors and the proceedings in said cause, as specified in the precipe for transcript filed by attorneys for appellant, Railroad Commission of Ohio, and there is embraced in such record, a true copy of the opinion of the Court therein filed and also the testimony, together with exhibits therein referred to, taken, used and filed, the originals of all which, remain in my custody as Clerk of said Court.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, Ohio, this 20 day of July, A. D. 1910, and in the 135th year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER, *Clerk.*
By R. C. DEAN,
Deputy Clerk.

125 And afterward towit on August 2, 1910, præcipe for appearance of counsel was filed which is in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2090.

RAILROAD COMMISSION OF OHIO
vs.
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company.

Frank O. Loveland, Clerk of Said Court:

Please enter my appearance as counsel for the plaintiff.

U. G. DENMAN,
Attorney General of Ohio.
THOMAS H. HOGSETT,
FREEMAN T. EAGLESON,
Of Counsel for Plaintiff.

And afterwards towit on April 6th, 1911, an entry was made upon the Journal of said Court clothed in the words and figures as follows:

United States Circuit Court of Appeals Sixth Circuit.

126 No. 2090.

RAILROAD COMMISSION OF OHIO
vs.
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company.

Before Severens and Knappen, C. J., J., and McCall, D. J.

This cause is argued in part by Mr. William D. Turner for the appellant and is continued until tomorrow for further argument.

And afterwards on April 7th, 1911, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals Sixth Circuit.

No. 2090.

RAILROAD COMMISSION OF OHIO
vs.
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R. Co.

This cause is further argued by Mr. William D. Turner and Mr. T. H. Hogsett for the appellant and by Mr. William B. Sanders and Mr. William M. Duncan for the appellee and is submitted to the Court.

127 And afterwards towit on May 2nd, 1911, a decree was entered in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals Sixth Circuit.

No. 2090.

RAILROAD COMMISSION OF OHIO
vs.
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R. Co.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs.

128 And afterwards towit on May 16th, 1911, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

129 Filed May 16, 1911. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2090.

RAILROAD COMMISSION OF OHIO, Appellant,
v.
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Submitted April 7, 1911. Decided May 2, 1911.

Before Severens and Knappen, Circuit Judges, and McCall, District Judge.

SEVERENS, *Circuit Judge*, delivered the opinion of the court:

At the time when this bill was filed in the Circuit Court, there was pending therein a consolidated suit constituted by the consolidation

of a suit brought by the National Car Wheel Co. of New York against the Wheeling and Lake Erie R. R. Co., a corporation of Ohio, and another suit brought by the Central Trust Company of New York, a corporation of New York, against the same defendant. The object of the bill in the latter case was the foreclosure of a mortgage of the properties of the Railroad Company wherein the Trust Company was mortgagee. From the allegations in the bill now before us, we gather that the object of the bill of the Car Wheel Company was the winding up of the affairs of the Railroad Company on the ground of its insolvency, the marshaling of liens upon its property and the protection of all parties interested. From the nature of these suits, no other ground being suggested, it is inferable that the jurisdic-
130 tion of the court depended in both cases upon the diverse citizenship of the parties.

Pursuant to the prayer of the bill in each of these two consolidated cases, B. A. Worthington was appointed receiver of "all and singular the property, assets, rights and franchises of the The Wheeling & Lake Erie Railroad Company, including all railroads and other property and assets, rights and franchises of whatsoever kind and description and wheresoever situated, owned or operated by the said railroad company, authorizing and directing the said receiver-ship to keep the railroads and other property of said The Wheeling & Erie Railroad Company employed and used as the same were theretofore used, and to continue the operation of said railroads, and to institute and prosecute all such suits as might be necessary in the judgment of the receiver for the proper protection of the property and trusts thereby vested in him and of the business placed in his charge." And it is alleged that the receiver thereupon "took possession of the said property, assets and franchises of The Wheeling & Lake Erie Railroad Company, and ever since has been and is now in possession of and operating the said railroads and property under and pursuant to the orders of said court."

Under the authority of the foregoing order, the receiver filed this bill against the Railroad Commission of Ohio, alleging that prior to a certain recent date the Railroad Company had fixed, and for a long time had maintained, a rate called a lake cargo rate, of 90 cents per ton for the transportation of coal from a locality known as "No. 8 Mining District in Ohio" to Huron and Cleveland, ports in that State on Lake Erie, and unloading the coal from its cars into the holds of vessels and to distribute and "trim" the coal in the holds and prepare in all things the cargo for its further transportation to distant ports on the Upper Lakes. Other coal transported to Huron or Cleveland not intended for lake transportation, but intended to be thence distributed to nearby points was charged with a rate of 81 per ton for the original transportation to Huron or Cleveland, as the case might be. But on the complaint of shippers from the mining dis-
131 trict, that the rate of 90 cents per ton for the transportation of the lake cargo coal to Huron and Cleveland was unreasonably high and ought to be reduced as much as 20 cents per ton, the Railroad Commission of Ohio on due notice to the Railroad Company and a hearing of all parties, held the complaint well founded and on the

28th of February, 1910, ordered the rate to be reduced from 90 to 70 cents and directed its order to be put in force by the Railroad Company from and after the 22nd day of April following. The following paragraphs of the order show its substance and effect:

"It is therefore ordered that said defendants, the Wheeling & Lake Erie Railroad Company and B. A. Worthington as receiver thereof, be and each of them is hereby notified and required to cease and desist from charging, demanding, collecting and receiving said excessive and unreasonable rate of 90 cents per ton f. o. b. vessel for the transportation of coal, carloads, from mines on the lines of said the Wheeling & Lake Erie Railroad Company in what is known as the Number Eight District in Ohio to the village of Huron, Ohio, and to the city of Cleveland, Ohio.

"It is further ordered that a rate of 70 cents per ton f. o. b. vessel, which the commission have found to be a just and reasonable rate to be charged for the transportation of coal, carloads, from said Number Eight District to the village of Huron, Ohio, and the city of Cleveland, Ohio, be substituted for said rate of 90 cents per ton f. o. b. vessel, found by the commission to be unreasonable, which rate of 70 cents per ton f. o. b. vessel, as aforesaid, shall be charged, imposed, observed and followed in the future by said the Wheeling & Lake Erie Railroad Company and said B. A. Worthington, receiver of said company, and by each of them in lieu of and in substitution of said rate of 90 cents per ton f. o. b. vessel, found by the commission to be unreasonable."

The purpose of the receiver's bill is to restrain the enforcement of this order of the Commission and from instituting any suit or proceeding to compel obedience to it. To this end the receiver, after stating in his bill the conditions above stated, alleged a variety of facts and circumstances including the cost of transportation as compared with the rate enjoined by the Commission, as exhibited
132 by the company's books and records which are set forth in detail, all tending to show, as the receiver claims, that the order of the Commission is confiscatory, and when compared with other rates charged and enforced by other railroad companies for similar services in nearby localities, discriminatory. Upon these allegations of fact of which the substance has been stated, the receiver charged as matter of law that the order of the Commission was void for the following reasons:

First. Because it "directly affects and interferes with this interstate commerce engaged in by your orator, over which the said Railroad Commission of Ohio has no authority or power inasmuch as the regulation of such commerce is vested in the Federal government under the provisions of the Constitution of the United States."

Second. Because it "deprives the owners and persons interested in the property constituting the receivership estate of their property without due process of law, denies to them the equal protection of the law, and takes private property for public purposes without due compensation."

Third. Because "the findings of the said Commission are contrary to the facts and are not supported by the testimony offered by

the parties at the time of the hearing before said Commission, and the said Commission, in its said findings of fact and conclusions of law, has failed to give due and proper consideration to the traffic conditions existing upon your orator's line of railroad. The said Commission has denied to your orator the right to recognize the effect of competition on rates, and has failed to distinguish between through and local rates. All as will appear from the testimony taken before said Commission which is tendered to the court for inspection upon the filing of this bill of complaint."

In addition to the Railroad Commission of Ohio, several other persons were made defendants such as mining companies and their representatives and shippers of coal from the locality above mentioned, whom it is unnecessary to further regard because as to all such other defendants the bill was dismissed, leaving the Railroad Commission as the sole defendant; and in that form the suit proceeded. The Railroad Company thereupon answered the bill. It is only
133 necessary to the determination of the questions we propose to consider, to say that the Commission admits the making of the order in question, as stated in the bill.

The whole controversy turns upon the question whether the Railroad Commission had authority to make the order. If it had not, all questions which relate to its merits become immaterial.

At the hearing in the Circuit Court, on the pleadings and proofs, Judge Taylor presiding, it was (as appears from his opinion sent up with the record) found, upon a recital of the facts as gathered from the evidence that the rate of 70 cents per ton was intended to apply to lake cargo coal destined for transportation to the Upper Lake ports, that is, to ports in other states and to such transportation only. We are satisfied, upon an examination of the evidence upon that point, that the conclusion of the learned judge was correct. It was thereupon decreed that the order fixing such rate was not within the power of the Railroad Commission of Ohio and was therefore void. And an injunction was ordered to issue restraining the Commission from attempting to enforce it. The case has been brought here by an appeal taken by the defendant, the Railroad Commission of Ohio.

The first matter to be attended to is that of a motion made by the appellee to dismiss the appeal "on the ground that the court has no jurisdiction to entertain it because the question involved is whether or not the order of the Railroad Commission of Ohio complained of is in contravention of the Constitution of the United States." We think the motion should be denied. It is based upon the erroneous conception that the appellate jurisdiction of the case is the same as that applicable to cases of original bills. But this is the case of a bill which is ancillary to the original suit; and the jurisdiction of the Circuit Court to entertain it depended upon its jurisdiction in those suits. They were brought by the receiver for the protection of the interests of the Railroad Company whose properties were in the hands of the court for administration. In such a case the court does not look either to the citizenship of the parties to the
134 ancillary suit nor to any other peculiar matter affecting its jurisdiction. It may be a case altogether devoid of those

conditions which are necessary to the jurisdiction of an original bill. Pope v. Louisville & N. R. R. Co., 173 U. S. 573. St. Louis K. C. & C. R. R. Co. v. Wabash R. R. Co., 217 U. S. 247. Loveland on the Appellate Jurisdiction of the Federal Courts, Section 158. It may be proper, though it is unnecessary, to say that even if this were an original bill, the claims made by it are not all of a character which require the appeal to be taken to the Supreme Court under the provisions of Sect. 5 of the Act creating the Court of Appeals. Some of the claims made are of that character, but one of them, the 3rd, at least, is not; and if it stood alone the appeal must have been taken to the Circuit Court of Appeals. In such case the appellant has his election to take the case to either court, where all the questions involved will be considered.

Coming then to the merits, we observe that while such an order as that made by the Railroad Commission might have been a valid exercise of its power before the time when the Federal Government undertook the exercise of its own authority granted by the commerce clause of the Constitution, as it has done in recent years, yet in view of the legislation by Congress concerning the duties and liabilities of railroad companies engaged in inter-state commerce, the power of the states has been greatly circumscribed. To the extent that Congress has by valid legislation taken control of the subject of inter-state commerce and regulated it, the control over it by the states must give way to the exercise of the paramount authority. Louisville & Nashville Rd. Co. v. Eubank, 184 U. S. 27. The regulation by one governmental authority would be inconsistent with its regulation by another.

We think it unimportant to inquire whether the Interstate Commerce Commission has hitherto prescribed any rates for the particular service which is the subject of this suit. It is enough that the matter is within its control and for aught we know that Commission may have not deemed it necessary to take action upon the subject, being satisfied with existing conditions.

Upon the question whether the commerce to which this
135 rate of 70 cents is prescribed by the Railroad Commission of Ohio is applied, is inter-state, a number of decisions are cited by counsel for the respective parties and undoubtedly they are not all of them in accord. It is not necessary to analyze them or to point out the drift of each of them severally. We think there is little or no support to the contention which the counsel for the appellant here make against the finding and decree of the court below.

In the decision by this court in the case of United States v. Geddes, 131 Fed. 452, we carried the limit of the state's jurisdiction as far as has been done in any other decision. It was rested upon the peculiar circumstances of that case and particularly upon the facts that the railroad company's contract for transportation had been completely performed when it deposited the goods at its own station and it had nothing to do and was in no wise concerned with their future disposition, whether they should be taken away by the consignee or some other railroad company by his authority. These

special facts upon which the decision turned do not exist here. By the very terms of the service which the Wheeling & Lake Erie Railroad Company contracted to perform, it was required to deliver the coal into vessels provided to receive it and to load the vessels with the coal property distributed in their holds and the cargo trimmed for its further transportation to the ports of other states. And this was included in the service for which the Commission fixed the rate of 70 cents per ton. It was a service which if the transportation had been ended by a delivery on its own docks or into its own warehouse would have been required to be performed by the subsequent carrier. Thus it participated in making the connection for the continuous transportation of the coal from the mines to its ultimate destination at the Upper Lake ports.

We are constrained to agree with the court below in its conclusion that the order of the Commission was beyond its powers. The law of Ohio defining its authority confined its functions to intrastate transactions, and gave it no authority to interfere with inter-state commerce. The fault is not in the law, but in
136 the Commission's failure to observe the limitation imposed by it. It follows that its order was not one sanctioned by the laws of the State and derived no force or validity from its assumption of a power not delegated to it by the legislature. It is only when such quasi legislative bodies are acting within the scope of their authority that their orders have the quality of legislation, or may properly be said to be the laws of the State, as they are sometimes characterized. Memphis v. Cumberland Telephone Co., 218 U. S. 624. Louisville v. Cumberland Telephone Co., 155 Fed. 725, a case decided by this court. There is not here, therefore, a controversy as to whether a State law is in conflict with the Constitution or any law of the United States.

The decree of the Circuit Court must be affirmed.

137 And afterwards towit on June 22nd 1911 a petition for appeal to the Supreme Court of the United States was filed which reads and is as follows:

United States Circuit Court of Appeals Sixth Circuit.

2090.

Railroad Commission of Ohio
vs.
B. A. Worthington, Receiver of The Wheeling & Lake Erie R. R. Co.

Petition for Appeal.

The above named appellant, the Railroad Commission of Ohio, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has therein been rendered on the 2nd day of

May, A. D. 1911, affirming the decree of the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division, and that the matter in controversy in said suit exceeds Five Thousand Dollars ($5,000.00), exclusive of costs; that said cause is one in which the United States Circuit Court of Appeals for the
138 Sixth Circuit has not final jurisdiction; that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed it in the above entitled cause, directing the Clerk of the Circuit Court of Appeals for the Sixth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Clerk of the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant, may be reviewed and if error be found, corrected according to laws and customs of the United States.

TIMOTHY S. HOGAN,
Attorney General of Ohio, Solicitor for Appellant.

T. H. HOGSETT,
CHAS. E. MARSHALL,
FRANK DAVIS, JR.,
Of Counsel.

And on the same day, towit on June 22nd 1911, an assignment of errors was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

139 #2090

RAILROAD COMMISSION OF OHIO
vs.
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R. Co.

Assignment of Errors.

The appellant in the above entitled cause in connection with its petition for appeal herein, presents and files therewith this assignment of errors as to which matters and things it says that the decree entered herein on the 2nd day of May, A. D. 1911, is erroneous, towit:

First. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the finding of said Circuit Court for the Northern District of Ohio, Eastern Division that the commerce to which said lake cargo rate is applicable is interstate commerce.

Second. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the findings of said Circuit Court for the Northern District of Ohio, Eastern Division that said lake cargo
140 rate applies only to coal transported from a point in the State of Ohio, towit, the Number Eight District, to a point outside the State of Ohio.

Third. That said Circuit Court of Appeals for the Sixth Circuit erred in not finding and holding upon a consideration of all the evidence that the movement or transportation of said Number Eight lake coal from said mines in said counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to said city of Cleveland and said Village of Huron, both in the State of Ohio, was an intrastate movement or transportation.

Fourth. That said Circuit Court of Appeals for the Sixth Circuit erred in holding and deciding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged for the services rendered in the transportation of said lake cargo coal.

Fifth. That said Circuit Court of Appeals for the Sixth Circuit erred in holding and deciding that said order of the Railroad Commission of Ohio, establishing rates for the movement or transportation of said lake cargo coal, is void and of no effect.

141 Sixth. That said Circuit Court of Appeals for the Sixth Circuit erred in not holding and deciding that said Railroad Commission of Ohio had power to prescribe the rate to be charged for services rendered in the transportation of said lake cargo coal and in not holding and deciding that said order of said Railroad Commission of Ohio is legal and binding on appellee herein.

Seventh. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree of the Circuit Court for the Northern District of Ohio, Eastern Division.

Eighth. That said Circuit Court of Appeals for the Sixth Circuit erred in not reversing the decree of the Circuit Court for the Northern District of Ohio, Eastern Division.

Ninth. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree of the Circuit Court for the Northern District of Ohio, Eastern Division, which said decree declared that said order of appellant entered on the 28th day of February, 1910, was void and of no effect.

142 Tenth. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the order of said Circuit Court for the Northern District of Ohio, Eastern Division, enjoining appellant from instituting, authorizing and directing any suit, action or actions for the purpose of putting said order of said appellant, made February 28, 1910, into effect.

Wherefore, appellant prays the Honorable Court to examine and correct the errors herein assigned and for the reversal of the finding, order, judgment and decree of the Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,
Solicitor for Appellant.

T. H. HOGSETT,
CHAS. C. MARSHALL,
FRANK DAVIS, JR.,
Of Counsel.

And afterwards towit on June 27th 1911, an order allowing said appeal was entered in said cause which reads and is as follows:

143 United States Circuit Court of Appeals, Sixth Circuit.

#2090.

RAILROAD COMMISSION OF OHIO
vs.
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R. Co.

Order Allowing Appeal.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed, upon the approval of a bond on appeal in the sum of $500.00, such appeal not to operate as a supersedeas.

LOYAL E. KNAPPEN,
United States Circuit Judge, Sixth Circuit.

Dated June 23, 1911.

And afterwards towit on July 18th 1911 a bond on appeal to the Supreme Court was filed which reads and is as follows:

141 United States Circuit Court of Appeals, Sixth Circuit.

#2090.

RAILROAD COMMISSION OF OHIO
vs.
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R. Co.

Bond on Appeal.

Know all men by these presents That we, Railroad Commission of Ohio, as Principal, and The National Surety Company of New York, as Surety, are held and firmly bound unto B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, in the full and just sum of $500.00, to be paid to the said B. A. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company, his certain successors or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 14th day of July, A. D 1911.

Whereas, the Railroad Commission of Ohio, the appellant
145 in the above entitled suit, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Sixth Circuit, on the 2nd day of May, A. D. 1911.

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

RAILROAD COMMISSION OF OHIO,
By C. A. RADCUPP, *Secretary.*
NATIONAL SURETY COMPANY OF NEW YORK,
[SEAL.] R. W. SCHNEIDER,
Resident Vice President.
—— CARROLL, *Resident Ass't Sec.*

The foregoing bond is approved this 17th day of July A. D. 1911, said appeal not to operate as a supersedeas.

LOYAL E. KNAPPEN,
United States Circuit Judge, Sixth Circuit.

146 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Railroad Commission of Ohio vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company No. 2090, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 31st day of July A. D. 1911.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

147 RAILROAD COMMISSION OF OHIO
against
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company.

Citation.

148 United States Circuit Court of Appeals, Sixth Circuit.

UITED STATES OF AMERICA,
Sixth Circuit:

To B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals, for the Sixth Circuit, wherein the Railroad Commission of Ohio is appellant, and you are appellee, to show cause, if any there be, why the decree rendered the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

This citation is issued on account of an error in, and in lieu of, a former citation issued pursuant to said appeal and dated July 17th, A. D. 1911.

Witness the Honorable Loyal E. Knappen, Judge of the United States Circuit Court of Appeals, for the Sixth Circuit, this 26th day of July, A. D. 1911.

LOYAL E. KNAPPEN,
Judge of the United States Circuit Court of Appeals, Sixth Circuit.

Service of the above citation and receipt of a copy thereof are hereby acknowledged and appearance of appellee herein is hereby entered this 8th day of August, A. D. 1911.

SQUIRE, SANDERS & DEY,
Attorneys for Appellee.

149 [Endorsed:] No. 2090. Railroad Commission of Ohio, Appellant, vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Appellee. United States Circuit Court of Appeals for the Sixth Circuit. Citation.

Endorsed on cover: File No. 22,852. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 776. Railroad Commission of Ohio, appellant, vs. B. A. Worthington, receiver of The Wheeling & Lake Erie Railroad Company. Filed September 7, 1911. File No. 22,852.

Supreme Court of the United States,

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

NOTICE, MOTION AND GROUNDS OF APPELLANT TO CONSOLIDATE AND ADVANCE FOR HEARING.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Attorneys for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

NOTICE, MOTION AND GROUNDS OF APPELLANT TO CONSOLIDATE AND ADVANCE FOR HEARING.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM 1911.
No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Notice, Motion and Grounds of Appellant to Consolidate and Advance for Hearing.

Notice.

To Messrs. Squire, Sanders & Dempsey, Counsel for Appellee herein, and in Case No. 505, *described below*:

Please take notice that the undersigned, as counsel for the appellant, will make a motion before the Court at the opening of its session on Monday, the 6th day of November, 1911, at or about the hour of noon, or as soon thereafter as counsel can be heard, to consolidate with the above styled case, the case of "Railroad Commission of Ohio, Appellant, against B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company,

Appellee," being case No. 505 on the docket of this Court for the October Term, 1911, to dispense with the printing of the record in said case No. 505, and to advance said consolidated case for hearing at the present term, or as soon thereafter as the other business of the Court will permit. Also please take notice that in support of said motion to consolidate and advance, the undersigned counsel will file and present to the Court, upon the submission of said motion, the grounds therefor, a copy of which motion and grounds is herewith served upon you.

TIMOTHY S. HOGAN,
FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Counsel for Appellant.

Service of the above notice is hereby accepted and receipt of a copy thereof, together with the motion and grounds to consolidate and advance for hearing is hereby acknowledged, this 13th day of October, 1911.

SQUIRE, SANDERS & DEMPSEY.
WM. B. SANDERS.
W. M. DUNCAN.
Counsel for Appellee herein and in case No. 505 referred to in said notice and motion.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1911.
No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

Motion and Grounds to Consolidate and Advance for Hearing.

Now comes the appellant herein and moves the Court to consolidate with the above styled case, case No. 505 on the docket of this Court for the October Term, 1911, entitled "Railroad Commission of Ohio, appellant, against B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, appellee," to dispense with the printing of the record in said last named case, No. 505, and to advance said consolidate case for hearing at the present term, or as soon thereafter as the other business of the Court will permit, on the following grounds, to-wit:

(1) The parties to both of the cases whose consolidation is herein sought are represented in this Court by the same attorneys, and the suit in which both these cases originated was a suit in equity and was instituted on the 28th day of March, 1910, in the Circuit Court of

the United States for the Northern District of Ohio, Eastern Division, by appellee herein, against appellant herein, the Railroad Commission of Ohio, to enjoin the enforcement of a certain order which said Railroad Commission of Ohio had theretofore made and entered in a proceeding before the said Commission, wherein The Pittsburgh Vein Operators' Association of Ohio was complainant and The Wheeling & Lake Erie Railroad Company and B. A. Worthington, Receiver of said Company, were defendants, which said order of said Railroad Commission established a rate of Seventy Cents (70c) per ton as the reasonable rate which should and must thereafter be charged by The Wheeling & Lake Erie Railroad Company and B. A. Worthington, Receiver of said Company, for the transportation of coal in car load lots from the Number Eight coal district in the State of Ohio to the ports of Huron and Cleveland, also in the State of Ohio, for transhipment by lake vessels.

Appellee herein in the complaint filed in said Circuit Court sought to enjoin the enforcement of said order on various grounds, but the only one finally insisted upon and the only one considered by said Circuit Court was that said order constituted an undue interference with Interstate Commerce in contravention of Section 8, Article 1 of the Constitution of the United States.

After hearing said cause said Circuit Court granted the prayer of the complaint and entered its decree, wherein it found that the trade or commerce in said coal traffic engaged in by complainant constituted Interstate Commerce, adjudged said order of said Railroad Commission of Ohio to be null and void and enjoined said

Railroad Commission of Ohio from enforcing said order.

(2) Subsequent to the making and entering of said decree by said Circuit Court, appellant herein perfected an appeal from said Circuit Court to the United States Circuit Court of Appeals for the Sixth Circuit, said appeal being cause No. 2090 on the docket of said Circuit Court of Appeals.

After said case had been appealed to the Circuit Court of Appeals for the Sixth Circuit and because of the existence of doubt as to whether said case was of such a nature that it could be properly appealed to the Circuit Court of Appeals, appellant also perfected an appeal from said Circuit Court direct to this Court, which said direct appeal is case No. 505 on the docket for the October Term, 1911, of this Court above referred to.

(3) After the perfecting of the direct appeal from the said Circuit Court to this Court, said cause as appealed to the Circuit Court of Appeals for the Sixth Circuit came on for hearing, and said Circuit Court of Appeals affirmed the decision of said Circuit Court, whereupon an appeal was perfected to this Court from said Circuit Court of Appeals, said cause on appeal from said Circuit Court of Appeals being case No. 776 on the docket for the October Term, 1911, of this Court, in which case this motion is filed.

(4) Since the record filed with this Court on direct appeal in case No. 505 is identical, except as to the appellate procedure, with the record taken to said Circuit

Court of Appeals in the present case, which has since been appealed to this Court, it follows that the two causes, whose consolidation is herein sought, present precisely the same issues to this Court, the only reason for said issues being presented to this Court in two causes being the inability to determine because of the uncertain meaning and dual nature of certain jurisdictional averments, which method of appeal was the proper one.

Permitting the consolidation of said causes now pending in this Court and dispensing with the printing of the record in case No. 505 will, therefore, conduce to the convenience of this Court and will avoid labor and expense which would otherwise be entailed upon both of the parties to these suits.

(5) The only issue raised in these two cases is whether or not the Railroad Commission of Ohio had and has authority to fix and establish the rate which shall be charged for transporting said lake cargo coal over the Wheeling & Lake Erie Railroad under a contract of carriage providing for the transportation of said coal from said mines in the State of Ohio, and the delivery of the same on board vessel at Ports of Huron and Cleveland, both in the State of Ohio, for carriage by vessel beyond, all of said transportation and delivery by said railroad taking place exclusively within the confines of the State of Ohio, and there being no common arrangement between the rail and water carrier for through transportation to any point beyond the State of Ohio, said coal when delivered aboard said lake vessels in

some instances continuing to be the property of the operator or shipper and in other instances then becoming the property of the purchaser of said coal from said operator or shipper.

(6) The movement of said lake cargo coal for the season of 1912 will begin in the months of March or April of that year and contracts for the sale of some of said lake cargo coal to be shipped during the year of 1912 will in all probability be made soon after the first of January, 1912, so that it is highly desirable on the part of the coal operators, the Railroad Company, and the public that it be ultimately determined as speedily as possible in what authority is vested the power to establish the rates on the commerce under consideration.

(7) Over one-half million tons of said lake cargo coal are transported annually over the line of railroad of which appellee herein is Receiver, and approximately Three Million tons of coal are transported on other lines of railroad from said Number Eight coal district in the State of Ohio to the lower lake ports in said state, for transportation by lake vessel beyond, so that the decision reached in the present case as to whether or not the Railroad Commission of Ohio is vested with authority to establish the rate in question will in effect also determine whether or not said Railroad Commission of Ohio has authority to regulate the rates which shall be charged on those other railroads and decide a question of wide public interest and concern.

Permitting the consolidation of the cases described herein and the hearing of the same at an early date will,

therefore, result in a single and speedy determination of a question of disputed State and Federal control and of vital interest and concern to the business and citizens of a large section of the United States.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,
FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Attorneys for Appellant.

Supreme Court of the United States.

October Term, 1911.
No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

Brief on Behalf of Appellee in Opposition to Motion of Appellant to Consolidate and Advance for Hearing.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Appellee.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

Supreme Court of the United States.

October Term, 1911.
No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

Brief on Behalf of Appellee in Opposition to Motion of Appellant to Consolidate and Advance for Hearing.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Appellee.

Supreme Court of the United States.

October Term, 1911.
No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

Brief on Behalf of Appellee in Opposition to Motion of Appellant to Consolidate and Advance for Hearing.

The appellant seeks to consolidate Cause No. 776 herein with Cause No. 505, for the October Term, 1911, entitled "Railroad Commission of Ohio, Appellant, vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Appellant," in substance upon the ground that the two cases involve the same controversy. The appellant also urges that the cases be advanced for hearing because the subject matter involves "a question of disputed state and federal control."

It is stated in paragraph 2, sub-division 1 of the motion, that the only ground "finally insisted upon" by the appellee herein, "and the only one considered by said Circuit Court was that the order constituted an undue interference with interstate commerce in contravention of Section 8, Article 1 of the Constitution of the

United States." This statement is partially incorrect, as will appear from an examination of the record. The court, having reached the conclusion that the commerce to which the rate in controversy applied was interstate commerce, simply refused to consider the other grounds urged by the complainant. The complainant, as a matter of fact, did not waive the other grounds (Circuit Court of Appeals Record, page 118).

We submit that the motion should be denied, for the following reasons:

The appellant herein has filed in this cause a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals; and in the brief filed in support of said petition the appellant claims that appeal did not lie direct to this Court from the finding and decree of the Circuit Court, and admits that the decision of the Circuit Court of Appeals is final.

The record being in this state, it would appear that both appeals, namely, Causes No. 505 and No. 776, have been taken improperly and should be dismissed. The motion to consolidate and to advance should be denied.

Respectfully submitted,

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

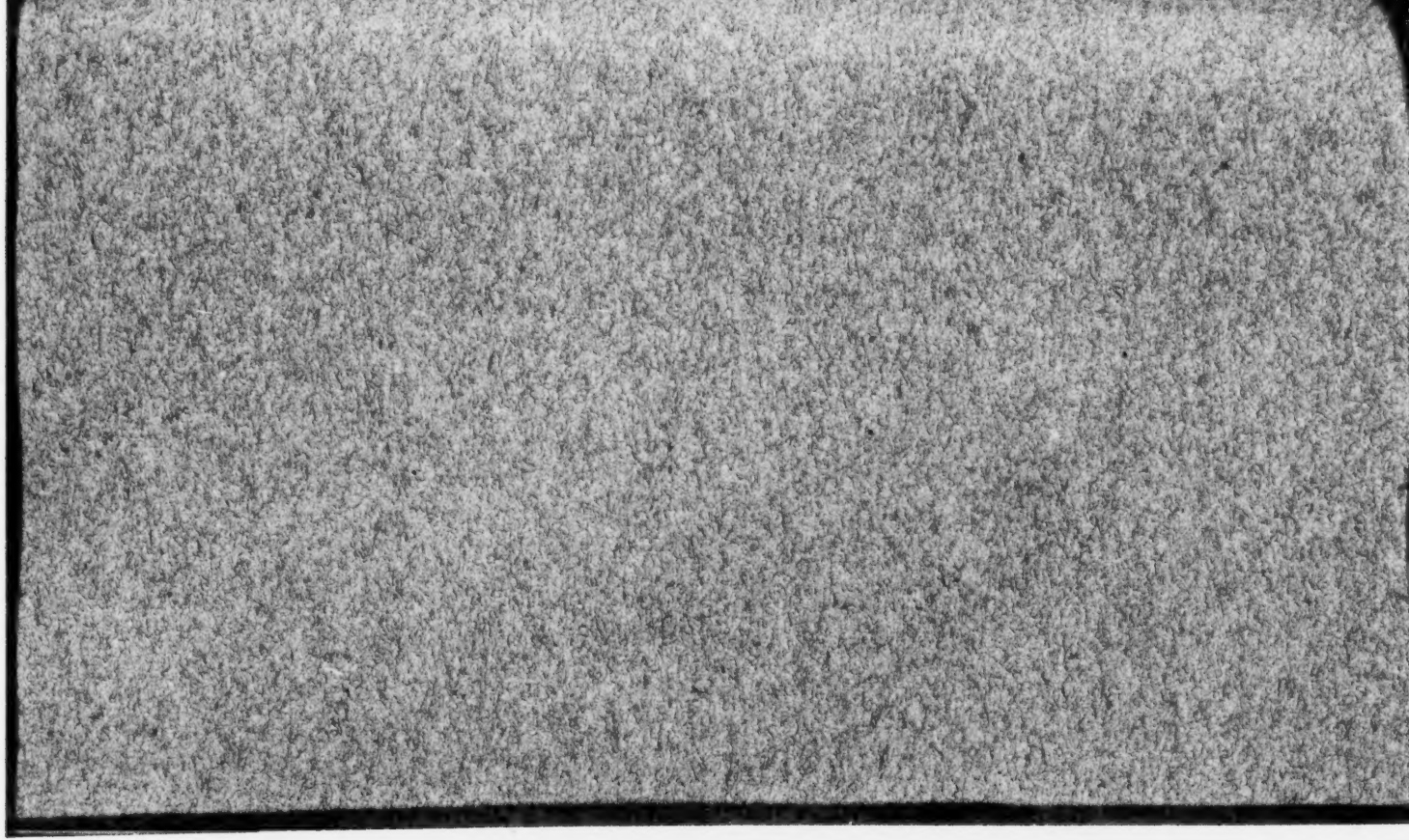
B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

PETITION OF APPELLANT FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGGETT,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., Cleveland, Ohio.



Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
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PETITION OF APPELLANT FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TIMOTHY S. HOGAN,
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T. H. HOGSETT,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

Petition of Appellant for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Your petitioner, The Railroad Commission of Ohio, respectfully shows to this Honorable Court as follows:

That on the 28th day of March, A. D. 1910, appellee herein, B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, filed his Bill of Complaint in the United States Circuit Court for the Northern District of Ohio, Eastern Division, against appellant herein, The Railroad Commission of Ohio, praying that said Railroad Commission of Ohio be enjoined and restrained from enforcing or putting into effect a certain order of said Railroad Commission of Ohio theretofore made, which said order of said Railroad Commission of Ohio established and fixed a rate of Seventy Cents (70c) per ton for transporting so-called lake cargo coal over the line of railroad operated by said B. A. Worthington,

Receiver of The Wheeling & Lake Erie Railroad Company, from the mines in the Number Eight District in the State of Ohio to the ports of Huron and Cleveland, both in the State of Ohio and there transferring the same from the railroad cars to the holds of lake vessels. Several different grounds were set out in the complaint as a basis for the relief prayed for, but the only ground upon which the suit proceeded to issue was that the order of the Railroad Commission interfered with Interstate Commerce.

That said cause came on for hearing before said court, and on the 25th day of June, 1910, said court entered its decree enjoining the enforcement of said order of the Railroad Commission of Ohio on the ground that the same was an undue interference with Interstate Commerce.

That said cause was then appealed to the Circuit Court of Appeals for the Sixth Circuit, and on the 2nd day of May, 1911, said Circuit Court of Appeals affirmed the decision of the Circuit Court.

In order that this Honorable Court may understand the grounds on which this petition for certiorari is based, the following additional statement is submitted:

The Bill of Complaint avers that complainant is the Receiver of The Wheeling & Lake Erie Railroad Company as the result of an appointment made by said United States Circuit Court for the Northern District of Ohio, Eastern Division, in certain causes then pending in said court, and that by order of said court he is authorized to file his Bill of Complaint against the Railroad Commission of Ohio. Said Bill of Complaint also

avers that said order of the Railroad Commission of Ohio constitutes an unlawful interference with the property constituting said receivership estate.

As a result of said averments and other related averments, said Circuit Court of Appeals concluded that said Bill of Complaint so filed by said Receiver in said Circuit Court was "ancillary to the original suit and the jurisdiction of the Circuit Court to entertain it depended upon its jurisdiction in those suits," that is, the original suits in connection with which the Receiver was appointed, as will be found in the printed report of the decision of that case by said Circuit Court of Appeals in 187 Federal Reporter, 965, 968.

Said Bill of Complaint also alleged that said Railroad Commission of Ohio,

> "as respects the matters and things hereinafter set forth, and as to the orders and rulings of said Railroad Commission, *has assumed and pretended to act under delegated power from the Legislature of the State of Ohio*,"

and later on in the bill it is also alleged that the traffic affected by said order of the Railroad Commission of Ohio is Interstate Commerce, consisting of lake cargo coal, which is

> "*actually transported from the mines in Ohio to docks* at the head of the Great Lakes *outside* of the State *of Ohio* by a continuous carriage * * *."

The law creating the Railroad Commission of Ohio and prescribing its powers and limitations provided and provides expressly as follows:

"The provisions of *the act shall apply to the trans-*

> *portation* of passengers and property *between points within this state* * * *."
>
> *General Code* 1910, Section 502.

In the opinion handed down by said United States Circuit Court of Appeals, it is stated that said order of the Railroad Commission of Ohio was beyond its powers, and that said Railroad Commission failed to observe the limitation imposed upon it by the law, and that said order was therefore "not one sanctioned by the laws of the state," the said opinion concluding with the statement that

> "there is not here, therefore, a controversy as to whether a state law is in conflict with the Constitution or any law of the United States."
>
> 187 Fed. Rep., 965, 970.

That subsequent to the entering of said decree by said Circuit Court and subsequent to the appeal taken to said Circuit Court of Appeals, but prior to the hearing of said cause by said Circuit Court of Appeals, your petitioner also perfected an appeal in said cause from said Circuit Court direct to this Honorable Court lest it should ultimately be held that the Bill of Complaint claimed that the order of the Railroad Commission of Ohio amounted to a law of the State of Ohio, and that the jurisdictional averment that such law of the State of Ohio contravened the provisions of the 14th Amendment and the Commerce Clause of the Constitution of the United States, served to give said Circuit Court original as distinguished from ancillary jurisdiction of said cause, in the event of which ultimate holding it would result that the only proper method of appeal would be

direct to this Honorable Court. Said cause on direct appeal is now on the docket of this Court, being Number 505 for the October Term, 1911.

Subsequent to the said decision of said Circuit Court of Appeals affirming the decree of said Circuit Court, an appeal in this cause was also perfected from said Circuit Court of Appeals to this Honorable Court on the theory that, if it should ultimately be held that said complaint claimed that said order of the Railroad Commission of Ohio constituted a law of the state in contravention of the Constitution of the United States, and thereby raised a constitutional question in an ancillary bill, your petitioner would have the right to appeal said cause from said Circuit Court of Appeals to this Court. Said cause on appeal to this Court from said Circuit Court of Appeals is now on the docket of this Court, being Number 776 on the docket of the October Term, 1911, in which cause this petition is filed.

Upon this statement of facts and the certified copy of the record in this case, which is filed herein in connection with the appeal in said cause perfected from said Circuit Court of Appeals and which is exhibited herewith as a part of this application, your petitioner submits the following reasons why the judgment of the Circuit Court of Appeals affirming the decree of the Circuit Court should be brought here for review by this Court on Writ of Certiorari:

First. Because your petitioner has no right of appeal or writ of error herein, if, in accordance with the contention hereby made herein in support of this petition, it shall ultimately be determined either that the

jurisdiction of the United States Circuit Court for the Northern District of Ohio in said cause was purely ancillary and in no wise extended by any additional jurisdictional averments, or that it was not even claimed in the Bill of Complaint filed in said cause that said order of the Railroad Commission of Ohio constituted a law of the State of Ohio in contravention of the Constitution of the United States.

Second. Because the allowance of the Writ of Certiorari herein prayed for, in addition to the two appeals perfected in said cause, as hereinbefore referred to, will avoid the necessity of an extensive examination and investigation on the part of this Court for the purpose of deciding positively whether or not this Court has jurisdiction on appeal.

Third. Because of the great importance of the case to the public and the parties.

Fourth. Because said Circuit Court of Appeals erred in affirming the findings of said Circuit Court that the commerce to which said rate on lake cargo coal is applicable is interstate commerce.

Fifth. Said Circuit Court of Appeals erred in affirming the findings of said Circuit Court that said rate on lake cargo coal applies only to coal transported from a point in the State of Ohio, to-wit, the Number Eight District, to a point outside the State of Ohio.

Sixth. Said Circuit Court of Appeals erred in not finding and holding upon consideration of all the evidence that the movement or transportation of said lake cargo coal from said Number Eight District coal mines

in the State of Ohio to said ports of Cleveland and Huron in the State of Ohio was an intrastate movement or transportation.

Seventh. Said Circuit Court of Appeals erred in holding and deciding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged for the services rendered in the transportation of said lake cargo coal.

Eighth. Said Circuit Court of Appeals erred in holding and deciding that said order of the Railroad Commission of Ohio, establishing rates for the movement or transportation of lake cargo coal is void and of no effect.

Ninth. Said Circuit Court of Appeals erred in not holding and deciding that said Railroad Commission of Ohio had and has power to prescribe the rate to be charged for services rendered in the transportation of said lake cargo coal, and in not holding and deciding that said order of said Railroad Commission of Ohio is legal and binding on appellee herein.

Tenth. Said Circuit Court of Appeals erred in affirming the decree of the said Circuit Court.

Eleventh. Said Circuit Court of Appeals erred in not reversing the decree of said Circuit Court.

Twelfth. Because the Circuit Court of Appeals has failed to follow or to give force or effect to the rulings and decisions of this Court on the legal propositions involved.

Thirteenth. Because a full consideration of this case by this Honorable Court will tend to prevent future

costly and undesirable litigation and promote justice among all interested.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this Court on a day certain therein to be designated a full and com plete transcript of the record and all proceedings of the said Circuit Court of Appeals, entitled, "Railroad Commission of Ohio, appellant, vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, appellee, No. 2090," to the end that said cause may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled, "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in said cause and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

RAILROAD COMMISSION OF OHIO,

By TIMOTHY S. HOGAN,
Attorney General of the State of Ohio.

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Of Counsel.

State of Ohio,
Cuyahoga County, ss.:

T. H. HOGSETT, being first duly sworn, deposes and says that he is one of the counsel for the Railroad Commission of Ohio, the petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

T. H. HOGSETT.

Sworn to before me by the said T. H. Hogsett and by him subscribed in my presence, this 5th day of October, A. D. 1911.

My commission expires June 1, 1914.

(Seal.) W. D. TURNER,
Notary Public.

Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

BRIEF IN SUPPORT OF PETITION OF APPELLANT FOR WRIT OF CERTIORARI.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,
Attorney for Appellant.

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

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TIMOTHY S. HOGAN,
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FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
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B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

BRIEF IN SUPPORT OF PETITION OF APPELLANT FOR WRIT OF CERTIORARI.

STATEMENT.

We desire to discuss somewhat more at length than was done in the petition for Certiorari herein the reasons for filing said petition and to suggest to this Court the grounds upon which it may deem it proper to grant the Writ.

As stated in the petition for Certiorari filed herein, the case whose record is sought to be brought here by that Writ directed to the Circuit Court of Appeals for the Sixth Circuit is also pending in this Court on appeal from said Circuit Court of Appeals, as well as on direct appeal to this Court from the Circuit Court of the United States for the Northern District of Ohio, Eastern Division. Of course, if either of these appeals was properly taken there is no reason for allowing this peti-

tion for Certiorari. It is also obvious that only one of the appeals taken to this Court properly lies. However, because of the contrariety of opinion as to the exact basis upon which the jurisdiction of the Circuit Court was originally predicated in this suit, and because of the importance of the issues involved, it has been deemed advisable, by your petitioner herein to pursue every available avenue for the purpose of properly and certainly presenting the issues of the case to this Court.

Accordingly, we shall herein, in support of the petition for Writ of Certiorari, present to this Court reasons why it may be and should be held that the decision in this case in the Circuit Court of Appeals for the Sixth Circuit is final; that neither of the appeals to this Court was properly taken; that the only proper method of obtaining an adjudication of the issues by this Court is by seeking a Writ of Certiorari; and that the issues involved are such as to justify this Court in its discretionary allowance of the petition for the Writ of Certiorari.

BRIEF.

I.

DIRECT APPEAL FROM THE CIRCUIT COURT TO THIS COURT DOES NOT LIE IN THIS SUIT.

A. IT IS NOT "CLAIMED" IN THE BILL OF COMPLAINT IN THIS CASE THAT THE CONSTITUTION OR LAW OF A STATE IS "IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES," AND, THEREFORE, NO RIGHT OF DIRECT APPEAL TO THIS COURT EXISTS.

Act of March 3, 1891, Section 5 (*U. S. Compiled Statutes*, 1901, p. 549).

The Bill of Complaint alleges that

> "the Railroad Commission of Ohio * * *, as respects the matters and things hereinafter set forth, and as to the orders and ruling of said Railroad Commission, *has assumed and pretended to act under delegated power from the Legislature of the State of Ohio.*"

The bill also avers that the traffic affected by the order of the Railroad Commission is Interstate Commerce which is

> "*actually transported from mines in Ohio to docks* at the head of the Great Lakes *outside of* the State of *Ohio* by continuous carriage broken only by the necessary unloading from cars into vessels."

The law of the State of Ohio prescribing the powers and limitations of the Railroad Commission of that state as it existed at the time of the filing of the Bill and as it now exists and with the existence of which the court was charged by judicial notice, expressly states:

> "The provisions of this act shall apply to the transportation of passengers and property between points within this State."

General Code, 1910, Section 502.

The Bill of Complaint, therefore, avers that the Railroad Commission of Ohio has assumed and pretended to do exactly that which the Statute of the State says it may not do, and the general allegations contained in the latter part of the Bill of Complaint to the effect that the Statutes of the State caused such an order of the Railroad Commission to become a law of the state, are, we submit incorrect, for the reason that the Statute, of course, only declares that orders of the Railroad Commission applying to transportation between points within the State of Ohio shall become and have the force of a law of the state.

The following language quoted from the final paragraph of the opinion of the Circuit Court of Appeals in the case below leads us to think that quite likely that court was of the opinion that it was not claimed in the Bill of Complaint that any law of the State was in contravention of the Constitution of the United States:

> "We are constrained to agree with the court below in its conclusion that the order of the Commission was beyond its powers. The law of Ohio defining its authority confined its functions to intrastate transactions, and gave it no authority to interfere with interstate commerce. The fault is not in the law, but in the Commission's failure to observe the limitation imposed by it. It follows that this order was not one sanctioned by the laws of the state, and derived no force or validity from this presumption of a power not delegated to it by the Legislature. It is only when such quasi legislative bodies are acting within the scope of their authority that their orders have the quality of legislation or may properly be said to be the laws of the State as they are sometimes characterized. *Memphis vs.*

Cumberland Telephone Co., 218 U. S., 624; *Louisville vs. Cumberland Telephone Co.*, 155 Fed., 725, a case decided by this court. *There is not here, therefore, a controversy as to whether a state law is in conflict with the Constitution or any law of the United States.*" (Italics ous.)

We, therefore, respectfully suggest that the Bill of Complaint avers that the Railroad Commission of Ohio acted *ultra vires*, and if such be the case it is well settled that such an averment does not amount to an allegation that a law of the State contravenes the Federal Constitution, and will not, therefore, furnish a sufficient basis for Federal jurisdiction or ground for a direct appeal to this Court.

Memphis vs. Cumberland Telephone Co., 218 U. S., 624.

Barney vs. City of New York, 193 U. S., 430.

Louisville vs. Cumberland, etc., Co., 155 Fed. Rep., 725 (Circuit Court, Sixth Circuit, 1907).

Manhattan Railway Co. vs. Mayor, etc., of the City of New York, 18 Fed. Rep., 195.

B. AN APPEAL WAS PROPERLY PERFECTED TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT PRIOR TO THE TIME WHEN THE DIRECT APPEAL TO THIS COURT WAS MADE.

(1) The appeal to the Circuit Court of Appeals was properly made, since it is clear from the Bill of Complaint that at least one of the jurisdictional averments therein was the existence of the receivership under the control and authority of the court in which the Bill was filed and the necessity for the protection of the receivership estate in the hands of the receiver appointed by that court.

We do not deem it necessary to quote the language

of the averments of the Bill, which sets out at length the appointment of the complainant as the receiver of the property of the Railroad Company by that court in certain causes therein referred to by name and that by order of that court the receiver is authorized to file the present Bill; that the order of the Railroad Commission "constitutes an unlawful interference with the property constituting the receivership estate administered as aforesaid"; and that the complainant receiver was appointed such in a suit brought against The Wheeling & Lake Erie Railroad Company by The National Car Wheel Company of the State of New York. The Bill of Complaint contains many other averments with respect to the receivership estate and the baneful effect which the order of the Railroad Commission will have thereon, and the only intimation as to the basis of the Circuit Court's jurisdiction in the original suit in which the complainant was appointed receiver is the diversity of citizenship suggested by the location of The National Car Wheel Company, which instituted the receivership proceeding.

The Circuit Court of Appeals on the hearing of this case below, upon motion of the receiver to dismiss the appeal in that court, had no doubt but that the jurisdiction of the Circuit Court was ancillary, and that the original receivership suit being appealable to the Circuit Court of Appeals, the ancillary suit was likewise appealable to that court.

Railroad Commission of Ohio vs. Worthington, 187 Fed. Rep., 965, 968.

This holding of the Circuit Court of Appeals as to

the ancillary nature of a Bill of Complaint such as that filed in the present case was correct.

White vs. Ewing, 159 U. S., 36.
Pope vs. Louisville, etc., Ry. Co., 173 U. S., 573.
Ex parte Tyler, 149 U. S., 164.
Compton vs. Jessup, 68 Fed. Rep., 263 (C. C. A., 6th Circuit, 1895).
Toledo, etc., Ry. Co. vs. Continental Trust Co., 95 Fed. Rep., 497 (C. C. A., 6th Circuit, 1899).

(2) If the appeal to the Circuit Court of Appeals was properly taken and perfected, as above indicated, then the subsequent direct appeal, even though proper if taken earlier, was void and of no effect because of the previous appeal to the Circuit Court of Appeals.

Cincinnati, Hamilton, etc., Railroad Co. vs. Thiebaud, 177 U. S., 615.
Columbus Construction Co. vs. Crane Co., 174 U. S., 600.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS FINAL, UNLESS IT MAY PLEASE THIS COURT TO ALLOW A WRIT OF CERTIORARI.

A. THE JURISDICTION OF THE CIRCUIT COURT IN THE ORIGINAL CASES IN WHICH B. A. WORTHINGTON WAS APPOINTED RECEIVER OF THE WHEELING & LAKE ERIE RAILROAD COMPANY WAS BASED ON DIVERSITY OF CITIZENSHIP.

See I, B (1), *supra*, p. 7.

An appeal in the ordinary course in those cases, therefore, would lie only to the Circuit Court of Appeals, and the decision of the Circuit Court of Appeals would be final.

Judiciary Act of March 3rd, 1891, Section 6.

B. THE BILL OF COMPLAINT BY THE RECEIVER TO INSTITUTE THIS SUIT IN THE CIRCUIT COURT WAS AN ANCILLARY BILL.

See I, B (1), *supra*, p. 7.

C. THE FINALITY OF A DECISION OF THE CIRCUIT COURT OF APPEALS IN A SUIT ARISING OUT OF AN ANCILLARY BILL DEPENDS UPON WHETHER OR NOT ITS DECISION IN THE MAIN SUIT WOULD BE FINAL.

There can be no doubt of the soundness of the preceding statement as a general proposition of law as the same has been repeatedly and invariably held by this Court whether the ancillary bill be supplemental, intervening or original in form.

Pope vs. Louisville, etc., Ry. Co., 173 U. S., 573.
Rouse vs. Letcher, 156 U. S., 47.
Rouse vs. Hornsby, 161 U. S., 588.
Carey vs. Houston, etc., Ry. Co., 161 U. S., 115.
Gregory vs. Van Ee, 160 U. S., 643.
Third Street, etc., Ry. Co. vs. Lewis, 173 U. S., 457.

In the case first above cited the opinion of the court reads thus in part, on p. 577:

> "* * * and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship, and the decree therein is, therefore, made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation are also final."

It may be urged, however, that granting that the bill which instituted the present suit was an ancillary one, it contained another jurisdictional averment which gives the right to carry this case on appeal from the Circuit

Court of Appeals to this Court, namely, the averment that a law of the State of Ohio was claimed to be in violation of the Constitution of the United States.

In answer to this contention, however, we refer to the first division of this brief, in which we attempted to show to this Court the reasons why the original bill did not make such a claim or properly set out any such jurisdictional averment.

See I, A, *supra*, p. 5.

For a second answer to the above supposed contention, we refer the Court also to the well-established rule of law that the appellate jurisdiction in any given case is determined by the jurisdictional averments made by the complainant in his Bill of Complaint, and that the subsequent interjection of issues, which if originally made would have extended the appellate jurisdiction, cannot vary the appellate jurisdiction which attached at the time of the filing of the Bill of Complaint.

Pope vs. Louisville, etc., Ry. Co., 173 U. S., 573.
Press Publishing Co. vs. Monroe, 164 U. S., 105.
Bagley vs. General Fire, etc., Co., 212 U. S., 477.
Third Street, etc., Railway Co. vs. Lewis, 173 U. S., 457.
St. Louis, etc., Railroad Co. vs. Wabash Railroad Co., 217 U. S., 247.

In the cases of *Press Publishing Company vs. Monroe* and *Bagley vs. General Fire, etc., Co.*, just cited, it was held that the interjection into the suit by the defendant of Constitutional or Federal statutory questions could not prevent the decisions of the Circuit Court of Appeals from being final in cases in which the complainant had based his case on diversity of citizenship. The

syllabus of *Third Street, etc., Railway Company vs. Lewis*, just cited, reads:

> "A decree of the Circuit Court of Appeals in a case in which the jurisdiction at the outset depended on diversity of citizenship is final, even if another ground of jurisdiction was alleged in a supplemental bill by which a new defendant was made a party."

The first syllabus of *St. Louis, etc., Ry. Co. vs. Wabash Railroad Company*, last above cited, also reads as follows:

> "The decree of the Federal Circuit Court, entered pursuant to the mandate of a Circuit Court of Appeals, upon a petition to enforce rights granted by a decree in intervention proceedings in a foreclosure suit, is not appealable to the Federal Supreme Court where the jurisdiction of the original foreclosure suit was based solely upon diversity of citizenship, although, when the case went back from the Circuit Court of Appeals to the Circuit Court, the latter court authorized an amendment to the petition, alleging that the decree ordered by the Circuit Court of Appeals failed to give full faith and credit to the original decree in the intervention proceeding."

It is not contended that any of the preceding citations are precisely in point on the proposition that under no possible circumstances can an ancillary suit be ultimately appealed to this Court where the main suit could not be so appealed. The generality and breadth of the language used in the opinions handed down by this Court, however, and the nearness with which the actual decisions of this Court approach to holding this proposition are such that we deem it advisable to submit the same to the consideration of this Court.

III.

A DECISION OF THIS COURT ON THE ISSUES DECIDED BY THE CIRCUIT COURT OF APPEALS IS OF SO MUCH IMPORTANCE AND CONCERN, NOT ONLY TO THE PARTIES HERETO, BUT TO OTHER RAILROADS AND SHIPPERS AND TO THE GENERAL PUBLIC, THAT WE FEEL JUSTIFIED IN REQUESTING THIS COURT TO GRANT THE WRIT PRAYED FOR.

St. Louis, etc., Railway Co. vs. Wabash Railroad Co., 217 U. S., 247, 251.

Without launching out into a general discussion of the significance and importance of the main question at issue in the present case, to-wit, the jurisdiction to regulate the rate on the so-called lake coal traffic on The Wheeling & Lake Erie Railroad, it seems sufficient to state that there has for many years been dissatisfaction with the rate charged by the carriers for the transportation of this coal; that there has also been a long existing difference of opinion as to the authority properly empowered to regulate the rate or charge on this traffic; that as a step toward the determination of this question, proceedings resulting in the order of the Railroad Commission of Ohio were begun before that body in the year 1909; that a complaint seeking a reduction in the charge imposed for the carriage of this traffic is also now pending before the Interstate Commerce Commission; that the determination of the proper authority to regulate the rate on the traffic in question must in the very nature of things ultimately be made by this Court; that the de-

cision of this question in the case now presented to this Court will, therefore, prevent long and expensive litigation on the part of others; and that the early determination of this question by this Court in this case will conduce greatly to the general commercial stability in the coal trade and other business incident thereto, for the reason that the amount of the so-called lake coal carried annually over The Wheeling & Lake Erie Railroad alone from the Ohio coal field is over one-half million tons, while over three million tons of this coal are carried on other railroads from the Ohio field.

IV.

SINCE THIS CASE IS ALSO PENDING IN THIS COURT ON APPEALS FROM BOTH THE CIRCUIT COURT AND THE CIRCUIT COURT OF APPEALS, THE ALLOWWANCE OF THE WRIT OF CERTIORARI PRAYED FOR WILL MAKE IT UNNECESSARY FOR THIS COURT TO ENTER UPON A LABORIOUS EXAMINATION OF THE RECORD OF THIS CASE FOR THE PURPOSE OF DETERMINING THE PRECISE AND TECHNICAL MANNER IN WHICH THIS CASE SHOULD BE PRESENTED TO THIS COURT FOR ITS CONSIDERATION.

Montana Mining Company vs. St. Louis Mining, etc., Co., 204 U. S., 204, 213.

On the page of the report just indicated, Mr. Justice Brewer uses the following language in the course of the opinion:

"As either by writ of error or certiorari the decision of the Court of Appeals can be brought be-

fore this court, and as each has been applied for, and as the importance of the case seems to demand our examination, it is scarcely necessary to consume time in attempting to decide positively whether there was a Federal question involved, or the jurisdiction depended solely on diverse citizenship. The writ of error was duly allowed prior to the filing of the record in the first instance, and, to avoid any further question of our jurisdiction, we allow the certiorari."

Your petitioner, the appellant herein, therefore, respectfully submits that it will be a proper exercise of the discretion of this Court to allow the Writ of Certiorari prayed for in the petition herein.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,
Attorney for Appellant.

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Of Counsel.

Supreme Court of the United States.

October Term, 1911.
No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

Brief on Behalf of Respondent Upon Petition for Allowance of a Writ of Certiorari.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

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APPELLEE.

Brief on Behalf of Respondent Upon Petition for Allowance of a Writ of Certiorari.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.

Supreme Court of the United States.

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vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
APPELLEE.

Brief on Behalf of Respondent Upon Petition for Allowance of a Writ of Certiorari.

I.

Statement of the Case.

(a)

THE PROCEEDINGS.

The petitioner seeks the allowance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, by which that court affirmed a judgment rendered by the Circuit Court for the Northern District of Ohio, Eastern Division, in a proceeding to enjoin the Railroad Commission of Ohio from enforcing its order fixing the rate charged by the railroad for the service rendered by it in the transportation of what is known in the trade as "lake cargo coal."

The Circuit Court found with the complainant Receiver on the issues joined, and enjoined the Railroad Commission of Ohio from enforcing the order, *because the rate in controversy applied only to coal transported*

from a point in the State of Ohio to a point outside of the State of Ohio, and was therefore an interstate rate, and was not subject to the relegatory power of the State of Ohio. The Circuit Court did not consider the other grounds attacking the validity of the order set forth in the bill of complaint, deeming it unnecessary in view of the conclusion reached respecting the character of the commerce to which the rate applied. C. C. of A. Printed Record, page 118.)

The Railroad Commission of Ohio perfected an appeal to the Circuit Court of Appeals, Sixth Circuit, from such judgment and decree of the Circuit Court. Subsequently, the Receiver filed in the Circuit Court of Appeals a motion to dismiss the appeal, claiming that appeal did not lie to the Circuit Court of Appeals, but direct to the Supreme Court, because the jurisdiction of the Circuit Court was invoked on the ground that a law of the State of Ohio, to-wit, the order of the Railroad Commission of Ohio, violated the United States Constitution. The Circuit Court of Appeals overruled the motion, holding that the proceeding attacking the validity of the rate was ancillary to the main proceeding in which the Circuit Court had taken possession of the property through the intervention of its Receiver, jurisdiction in which case was based upon diversity of citizenship of the parties. *The Circuit Court of Appeals* then proceeded to hear the case upon its merit, *and having reached the same conclusion as to the effect of the testimony and the character of the commerce to which the rate in controversy applies*, sustained the judgment and decree of the Circuit Court. 187 Fed., 965, at page 966.

After the respondent herein had filed in the Circuit Court of Appeals his motion to dismiss the appeal, but

before same was heard, the petitioner herein undertook to perfect an appeal to this Court direct from the Circuit Court. This appeal is Cause No. 505, October Term, 1911, entitled, "Railroad Commission of Ohio, Appellant, vs. B. A. Worthington, Receiver, Appellee." After the Circuit Court of Appeals had passed upon the motion to dismiss, as stated above, the petitioner herein undertook to perfect an appeal from the Circuit Court of Appeals to this Court. This appeal is Cause No. 776, October Term, 1911, same title as in said Cause No. 505. The petition for writ of certiorari has been filed in said Cause No. 776.

(b)

THE FACTS.

This controversy grows out of a complaint originally filed with the Railroad Commission of Ohio by the Pittsburgh Vein Operators' Association, whose members own or operate coal mines in what is known as the Pittsburg No. 8 Ohio coal district, situated in Jefferson, Harrison, and Belmont Counties, attacking the reasonableness of the existing rate charged by the Receiver of The Wheeling & Lake Erie Railroad Company on "lake cargo coal" from the No. 8 Ohio district to the hold of vessels at Lake Erie ports for shipment to points beyond the State of Ohio. (C. C. of A. Record, pages 30 to 33, inclusive.)

The Railroad Commission of Ohio heard the complaint, notwithstanding the protest of the railroad company that the rate applied only to interstate commerce engaged in by the parties, and on February 28, 1910, made an order fixing the rate on said "lake cargo coal" from the No. 8 District of Ohio to Lake Erie ports, f. o. b. vessels at said ports (C. C. of A., Printed Record,

page 35). Thereupon, the Receiver of the railroad filed a bill of complaint to enjoin the Railroad Commission of Ohio from enforcing the order on the ground as stated above. Testimony offered on behalf of the parties showed, as was contendeed by the Receiver of the railroad company and as found by the Circuit Court, that lake cargo coal consists only of coal transported from mines in the State of Ohio to points in the vicinity of the head of the Great Lakes outside the State of Ohio via rail to points in Ohio known as lower lake ports and thence by vessel to points at the head of the Great Lakes known as upper lake ports; that the transportation of such lake cargo coal is one entire transaction participated in by the shipper, the railroad company and the vessel under a common arrangement, whereby each party performs its respective duties necessarily incident to such interstate transportation, to-wit, the shipper furnishes the coal and arranges for the vessel transportation, the railroad company carries the coal by rail from mines to lower Lake Erie ports and unloads the coal into the vessel so engaged by the shipper to transport the coal up the Great Lakes, the vessel performs the vessel carriage and consents to the performance by the railroad company of an unloading service in the hold of the vessel, and that each party in performing its respective duty acts as a link in the interstate transportation intended by all to be carried on, each link being necessary and essential to the accomplishment of the common purposes of the parties, namely, the transportation of coal from the No. 8 District of Ohio to the head of the Great Lakes. (See allegations of bill of complaint, C. C. of A., Record, pages 8 to 11, inclusive; and the finding of the Circuit Court with the complainant on the issues thus joined, C. C. of A., Record, page 118.)

II.

ARGUMENT.

In the brief filed on behalf of the petitioner, counsel claim that appeal to the Circuit Court of Appeals was properly taken and admit the finality of that court's decision. We, therefore, confine our remarks to the points contained in the third and fourth parts of petitioner's brief stating the petitioner's reasons for the issuance of the writ.

It is submitted the writ should be denied, for the following reasons:

(a) The record does not disclose any question of law in regard to which there is not a uniformity of ruling. The exclusive jurisdiction of the Federal Government over rates applicable to interstate commerce is well established. *Wabash, etc., Railway Company vs. Illinois*, 118 U. S., 557; *Fargo vs. Michigan*, 121 U. S., 230, at page 247; *Philadelphia & S. S. Company vs. Pennsylvania*, 122 U. S., 326, at page 338; *Covington, etc., Bridge Company vs. Kentucky*, 154 U. S., 204, at page 219; *Dow vs. Beidelman*, 125 U. S., 680; *Interstate Commerce Commission vs. Railway Company*, 167 U. S., 479; *Louisville & Nashville, etc., Co. vs. Eubank*, 184 U. S., 27.

The petitioner does not claim that the Railroad Commission of Ohio has any power to regulate interstate rates. On the contrary, the petitioner, in opposing the motion to dismiss filed by the respondent herein, urged that the bill showed, if it showed anything, that the act of the Railroad Commission was *ultra vires*, because the Ohio Railroad Commission Act limited the jurisdiction of the Commission to intrastate transactions. The Circuit Court of Appeals adopted this view, using the following language (187 Fed. Rep., at page 970):

"We are constrained to agree with the court below in its conclusion that the order of the Commission was beyond its powers. *The law of Ohio defining its authority confined its functions to intrastate transactions, and gave it no authority to interfere with interstate commerce. The fault is not in the law, but in the Commission's failure to observe the limitations imposed upon it.* It follows that its order is not one sanctioned by the laws of the State and derived no force or validity from its assumption of a power not delegated to it by the Legislature. * * * There is not here, therefore, a controversy as to whether a state law is in conflict with the Constitution or any law of the United States." (Italics ours.)

(b) The record shows that the determination of the controversy depended upon the determination of an issue of fact, that is, the circumstances and conditions surrounding and the arrangement under which lake cargo coal is transported.

The Receiver of the railroad company claimed that the transportation of lake cargo coal (to which the lake cargo rate applied) constitutes one entire transaction, participated in by shipper, the railroad company and the vessel carrier, whereby each party performs its respective duty in the transportation of coal from mines in Ohio to points at the head of the Great Lakes outside of the State of Ohio; that is, the shipper furnishes the coal and arranges for the vessel transportation, the railroad carries the coal from the mines to Lake Erie ports by rail and unloads it into holds of vessels engaged by the shipper, the vessel performs the water carriage and consents to the service by the railroad company of unloading the coal into the holds of the vessels; and each party in performing its respective duty acts as a link in the interstate transportation intended by all to be

carried on, each link being necessary and essential to the common purposes of the parties, namely, the transportation of coal from the No. 8 District in Ohio to the head of the Great Lakes (Circuit Court of Appeals Record, pages 8 to 11, inclusive).

The Railroad Commission of Ohio, on the other hand, claimed that the rail portion of the service performed by the Receiver of the railroad company in connection with the transportation of lake cargo coal was a separate and distinct transaction performed wholly in the State of Ohio, and therefore subject to state regulation (C. C. of A. Record, pages 58, 59 and 60). The Circuit Court examined the testimony submitted by the parties in support of the issues thus joined and found with the Receiver of the railroad company. The decree of the Circuit Court reads in part as follows (C. C. of A. Record, page 118):

> "* * *, and the court after due consideration and being fully advised in the premises finds with the complainant on the issues joined with reference to the character of such commerce and that the allegations of the bill of complaint respecting the character of the commerce to which the lake cargo rate is applicable are true, that the lake cargo rate involved in this controversy applies only to coal transported from a point in the State of Ohio, to-wit, the No. 8 District, to a point outside the state, * * *."

The Circuit Court of Appeals reached the same conclusion as the Circuit Court respecting the probative effect of the testimony offered by the Receiver of the railroad. On this point the Circuit Court of Appeals say (187 Fed. Rep., 965, at page 968):

> "At the hearing in the Circuit Court, on the pleadings and proofs, Judge Tayler presiding, it was (as appears from his opinion sent up with the

record) found, upon the recital of the facts *as gathered from the evidence*, that the rate of 70 cents per ton was intended to apply to lake cargo coal destined for transportation to the upper lake ports—that is, to ports in other states—and to such transportation only. *We are satisfied, upon an examination of the evidence* upon that point, that the conclusion of the learned judge upon that point was correct." (Italics ours.)

(c) It is a well-settled rule of this Court that the concurrent decisions of two subordinate courts upon questions of fact will be followed unless shown to be erroneous.

The Carib Prince, 170 U. S., 655.

Court say, page 658:

"The settled doctrine of this court is that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous. *Compania La Flecha vs. Brauer*, 168 U. S., 104, and a case there cited; *Stuart vs. Hayden*, 169 U. S., 1; *Baker vs. Cummings*, 169 U. S., 189, 198. As, after a careful examination of the evidence, we conclude that it does not clearly appear that the lower courts erred in their conclusion of fact, we accept as indisputable the finding that the Carib Prince was unseaworthy at the time of the commencement of the voyage in question, by reason of the defect in the tank above referred to."

(d) No showing is made either in the petition for a writ of certiorari or brief of petitioner that the conclusions reached by the Circuit Court and Circuit Court of Appeals as to the probative effect of the testimony are erroneous. So far as this proceeding is concerned, we submit that the Court is justified in accepting the decisions of the two lower courts and applying the general rule so often announced that "this court will

not reverse the concurring decisions of two subordinate courts upon questions of fact, unless there be a clear preponderance of evidence against their conclusions."

(c) The application for this writ is allowed only in cases which fall "within the category of questions of such gravity and general importance as to require the review of conclusions of the Circuit Court of Appeals in reference to them." *In Re Woods*, 143 U. S., 205; *Lau Ow Bew, Petitioner*, 141 U. S., 583; *American Construction Company vs. Railway Company*, 148 U. S., 372.

The record does not show any question falling within the category of questions of importance and general interest. The record discloses a not unusual situation in connection with the transportation of a commodity from a point in one state to a point in another state by means of rail and vessel carriers, and there is nothing unusual in the fact that the transportation facilities of the rail carrier in this instance are located entirely within the State of Ohio. It is settled beyond question that such a situation does not exempt the rail carrier from regulation when it undertakes to utilize its transportation facilities in connection with the transportation of merchandise from a point in one state to a point in another. See *Wabash Railway Company vs. Illinois*, 118 U. S., 557, and cases cited above under sub-division (a) hereof.

The Circuit Court and the Circuit Court of Appeals in disposing of the controversy found with the Receiver of the railroad on the issue of fact as to the circumstances and conditions under which the Receiver of the railroad company participated in the transportation of lake cargo coal from a point in one state to a point outside that state, and then applied the

well-settled rule above stated, viz., that the regulation of rates on interstate commerce is vested in the Federal Government, pointing out that this very limitation was recognized in the Ohio statute creating the commission, because the statute affirmatively limits the power of the Ohio Commission to *intrastate* transactions.

(f) Inasmuch as the petitioner urges the granting of the writ upon the ground that the decision of this question will prevent long and expensive litigation and "conduce greatly to the general commercial stability in the coal trade" (although there is no fact to support the general statement), it may be well to call the Court's attention to that which does not appear on the record as presented by the petition, but which the respondent offers to prove at such time as the Court may desire.

The northwestern part of the United States in the vicinity of the Great Lakes obtains a large portion of its supply of coal from Pennsylvania, West Virginia and Ohio. The coal moving from such originating points moves to lower Lake Erie ports by rail and from thence to ports at the head of the Great Lakes by vessel. Coal transported in this way, as stated above, is known as "Lake Cargo Coal." Lake cargo coal moving from Ohio competes in the northwest with lake cargo coal similar in quality from the Pennsylvania and West Virginia districts. The rail rates from the districts in these various states are based upon a differential in favor of Ohio.

There is now pending before the Interstate Commerce Commission four cases, involving the readjustment of the lake cargo rate from the states of Pennsylvania, West Virginia and Ohio to lower Lake Erie ports for trans-shipment via vessel to points at the head of

the Great Lakes. (a) The first case is "Investigation and Suspension Docket No. 26," entitled "In the Matter of the Investigation of Increase in Coal Rates by Carriers Serving the West Virginia Coal Fields," and involves the rate on lake cargo coal from West Virginia. [redacted] The Wheeling & Lake Erie Railroad Company, is a party to this cause. (b) The second case is No. 3853, entitled "John W. Boileau vs. The Pittsburgh & Lake Erie Railroad Company, et al.," and involves the rate on lake cargo coal from the Pittsburgh district. The Wabash, Pittsburgh Terminal Railway Company, with which the respondent's railroad connects and serves the Pittsburgh district, is a party to this proceeding. (c) The third and fourth cases are brought by the same complainant, and involve the rate on lake cargo coal from the No. 8 Ohio District, the subject matter of this controversy. *The complainant is The Pittsburgh Vein Operators' Association*, the members of which own and operate mines in the No. 8 District of Ohio, *the same complainant attacking the reasonableness of the rates involved in this controversy when the matter was pending before the Railroad Commission of Ohio;* one case is directed against the Pennsylvania Company exclusively and the other against The Wheeling & Lake Erie Railroad Company and B. A. Worthington, its receiver; the Commission for some time past has been, and still is investigating the various complaints aforesaid, although no testimony has as yet been taken in the Ohio case.

In the complaint against the receiver of The Wheeling & Lake Erie Railroad Company, filed with the Interstate Commerce Commission, as aforesaid, are found the following allegations:

"* * * said Receiver has been, and now is, engaged in the carriage and transportation of coal from the No. 8 field * * * in the State of Ohio, to certain ports on the southern shore of Lake Erie, * * * both located within the State of Ohio, which said coal at said ports * * * has been and now is transferred to lake vessels, and has been and now is carried on said lake vessels to points in other States * * *; that said coal so shipped from said mines to said lower lake ports for trans-shipment by water * * * is and for a long time has been transported by said defendants and each of them, under a contract of carriage, by the terms of which said defendants * * * agree to transport said coal in car-load lots from said mines to said lower lake ports * * *, and there unload the same upon vessels to be supplied * * * by said shippers * * *, and * * * distribute said coal in the holds of said vessels, * * * it being further understood that said shippers will furnish lake vessels for the transportation of said coal by water to points in other States * * *." (See Article 2 of the petition.)

And also the following:

"That said lake cargo coal so shipped by rail and water, as aforesaid, meets in the northwestern States * * * with said coal so shipped and transported from said West Virginia and said Kentucky coal fields, and competes in said northwestern coal markets with said West Virginia and Kentucky coal; * * *." (See Article 7 of said complaint.)

And also the following:

"* * * said defendant Receiver, * * * have been and now are giving to the West Virginia and Kentucky coal districts and to the coal operators and shippers therein, an undue and unreasonable preference and advantage; * * *." (See Article 9 of said complaint.)

Under such circumstances it is but fair to presume that the Interstate Commerce Commission will in the

near future readjust the rates and fix the differentials between the various lake cargo coal-producing districts, and thus produce that "general commercial stability in the coal trade" desired by the real party in interest in this controversy, namely, the coal operators in the No. 8 Ohio District. We therefore submit that the case does not present a situation of such general importance as to require a review of the conclusions of the Circuit Court of Appeals.

For the above reasons the petition should be denied.

Respectfully submitted,

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.